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13 UNITED STATES DISTRICT COURT  
14 CENTRAL DISTRICT OF CALIFORNIA

15 IN RE NEW CENTURY ) Consolid. Case No. 2:07-cv-00931-DDP  
16 ) (FMOx)  
17 )  
18 ) **DISCOVERY MATTER**  
19 )  
20 ) JOINT STIPULATION REGARDING  
21 ) KPMG LLP'S MOTION TO COMPEL  
22 ) THE PRODUCTION OF DOCUMENTS  
23 ) FROM LEAD PLAINTIFF NEW YORK  
24 ) STATE TEACHERS' RETIREMENT  
25 ) SYSTEM AND PLAINTIFFS CARL  
26 ) LARSON AND CHARLES HOOTEN  
27 )  
28 ) Date & Time: October 14, 2009, 10 a.m.  
 ) Dept: F  
 ) Discovery Cut-off: None Set  
 ) Pretrial Conf.: None Set  
 ) Trial Date: None Set

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JOINT STIPULATION RE KPMG'S MOTION TO COMPEL THE PRODUCTION OF  
DOCUMENTS

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Pursuant to Federal Rule of Civil Procedure 37(a) and Local Rule 37-2, Defendant KPMG LLP (“KPMG”), Lead Plaintiff the New York State Teachers’ Retirement System (“NYSTRS”), and plaintiffs Carl Larson (“Larson”) and Charles Hooten (“Hooten”) (collectively “Plaintiffs”), submit this Joint Stipulation Regarding KPMG’s Motion to Compel the Production of Documents from Plaintiffs (“Motion to Compel”).<sup>1</sup> In accordance with Local Rule 37-1, counsel for the parties conferred telephonically and exchanged multiple letters regarding the disputed issues set forth below.

### **KPMG’s INTRODUCTORY STATEMENT**

By this motion, KPMG seeks an order from the Court compelling the production of documents that Plaintiffs have wrongfully and repeatedly withheld upon boilerplate assertions of relevance, undue burden, and attorney-client and work-product privileges. The documents in dispute are undoubtedly relevant to the claims or defenses asserted in this litigation, or at the very least, relate to the subject matter of this litigation. This Court has previously held that the relevancy of discovery requests are broadly construed and “should be allowed unless it is clear that the information sought can have no possible bearing on the claim or defense of a party.” July 8, 2009 Order Re: Discovery Motion, at 2. Plaintiffs cannot make such a showing as to the

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<sup>1</sup> As is evident from the text of the disputed document requests, some of the requests are specific only to NYSTRS; KPMG moves to compel production of documents from those requests as to NYSTRS only. *See* Request Nos. 11, 21-23 and 26-32. With respect to the requests not specific to NYSTRS (Request Nos. 33, 36, 38 and 50-57), KPMG moves to compel documents from NYSTRS, Larson and Hooten, on the basis that Lead Plaintiff’s counsel previously confirmed that the responses to those requests were on behalf of NYSTRS, Larson, and Hooten. *See* Declaration of Jodi E. Lopez (“Lopez Decl.”) Exh. F, at 135-136; Lopez Decl., Exh. H, at 151; Lopez Decl., Exh. J, at 166.

1 requested documents, and this Court should thus reject their claims of irrelevancy, and  
2 their unsupported assertions of undue burden.

3 For example, NYSTRS claims that their Board of Trustee minutes, documents  
4 relating to investment vehicles detailed in their annual reports, and other documents  
5 relating to their investment vehicles or strategies, are irrelevant solely on the basis that  
6 NYSTRS purportedly invests based upon an indexing process. Yet in this litigation,  
7 Plaintiffs contend they suffered damages related to their investments in New Century  
8 securities arising from KPMG's purported violations of Section 11 of the Securities  
9 Act of 1933 and Section 10(b) of the Securities Exchange Act regarding KPMG's  
10 audits of New Century's 2005 financial statements and internal controls. Issues of  
11 materiality, reliance, and causation are central to such claims, and highly relevant to  
12 the proof of such issues are a plaintiff's investment history, practices, strategy, or  
13 decisions. For example, the Board of Trustee minutes and other requested documents  
14 may support or controvert Plaintiffs' contention that NYSTRS invests pursuant to an  
15 indexing process, or the documents may demonstrate NYSTRS's understanding of  
16 market conditions, investment risks, market warnings, sophistication, or risk  
17 tolerance. Most notably, such documents may show KPMG's alleged misstatements  
18 could not have caused Plaintiffs' claimed damages, or may negate Plaintiffs' reliance  
19 upon KPMG's alleged misstatements. The documents may also establish or disprove  
20 that NYSTRS will be an adequate class representative, a key issue for purposes of  
21 class certification. Plaintiffs cannot in good faith contend that such documents "have  
22 no possible bearing on the claim or defense of a party"; they are thus relevant and  
23 must be produced.

24 Plaintiffs also make boilerplate objections that the production of such  
25 documents would be overly burdensome and may disclose private or confidential  
26 information. Plaintiffs failed to present any evidence to KPMG supporting their  
27 undue burden objection, nor can they defend their privacy objection because the  
28

1 requests concededly relate only to NYSTRS, not to third parties that are not part of the  
2 putative class. In any event, plaintiffs cannot explain why any confidentiality  
3 concerns could not be obviated by a protective order, such as by the protective order  
4 concerning confidentiality recently entered by this Court.

5 Plaintiffs are also wrongfully withholding documents they collected during the  
6 course of their investigation on the basis that such documents—which existed before  
7 the litigation and many of which were collected from New Century employees,  
8 shareholders, or third-party witnesses—are protected under attorney-client or work-  
9 product privileges. Plaintiffs apparently are themselves unsure of whether those  
10 privileges apply to these documents; Plaintiffs initially objected to the production of  
11 such documents, then agreed to produce them, but then stated they would produce  
12 only those documents that they collected and which they referred to in the Complaint.  
13 Lopez Decl. ¶ 12.

14 To make matters clear for Plaintiffs, neither privilege protects the documents  
15 they collected during the course of their investigation or documents they referred to in  
16 their Complaint. As recognized by numerous courts and treatises, the attorney-client  
17 and work-product privileges do not protect documents collected during factual  
18 investigations; in fact, even documents collected from an attorney's client are not  
19 protected by those privileges. A contrary rule would immunize any document from  
20 discovery as long as opposing counsel got his or her hands on it first, regardless of the  
21 evidentiary value of the document. The law does not support such gamesmanship,  
22 and this Court should compel production of those documents.

23 In addition, it bears mention that plaintiffs have unreasonably drawn out the  
24 meet-and-confer process. KPMG served its First Set of Requests for Production of  
25 Documents (the "Requests") upon Plaintiffs on March 27, 2009. Plaintiffs responded  
26 a month later with boilerplate objections, most of which unreasonably limited the  
27 timeframe of Plaintiffs' search for documents responsive to the Requests. KPMG  
28

1 then engaged in a lengthy meet-and-confer process with Plaintiffs, during which  
 2 Plaintiffs purportedly amended *all* of their responses to the Requests on June 11,  
 3 2009, over two months after service of the Requests. It took numerous letters and  
 4 telephonic conferences to narrow finally plaintiffs' positions regarding the withheld  
 5 documents so that KPMG could bring this Motion to Compel. Moreover, over five  
 6 months after service of the Requests and despite the fact that most of the requests are  
 7 not in dispute, Plaintiffs have produced only 2,955 pages to KPMG<sup>2</sup> and have refused  
 8 to identify a date by when KPMG can expect Plaintiffs to complete their document  
 9 production. Lopez Decl. ¶ 16.

10 KPMG is entitled to the production of the documents in dispute, and Plaintiffs  
 11 should not be allowed to withhold them any longer. For those reasons and as  
 12 expressed below, the Court should grant KPMG's Motion to Compel.

### 13 **PLAINTIFFS' INTRODUCTORY STATEMENT**

14 This discovery dispute concerns a transparent effort by Defendant KPMG LLP  
 15 ("KPMG") to burden and harass the institutional Lead Plaintiff, the New York State  
 16 Teachers' Retirement System ("NYSTRS"), through blunderbuss discovery requests  
 17 seeking documents that have no relevance to the claims or defenses in this litigation or  
 18 improper disclosure of privileged or protected information. The Court should not  
 19 permit KPMG to overburden and harass NYSTRS through improper discovery.<sup>3</sup>

20  
 21 \_\_\_\_\_  
 22 <sup>2</sup> For comparison, KPMG has produced to Plaintiffs a total of 2,043,881 pages of  
 documents as of September 11, 2009. Lopez Decl. ¶ 17.

23 <sup>3</sup> KPMG's motion purports to seek to compel the production of documents from the  
 24 representative individual plaintiffs, Carl Larson ("Larson") and Charles Hooten  
 ("Hooten") (together with NYSTRS, "Plaintiffs"). However, KPMG's motion fails to  
 25 identify specifically any documents or categories of documents it seeks from Larson  
 26 or Hooten, both of whom have already completed their production of New Century  
 documents. Accordingly, to the extent KPMG contends that the requests at issue  
 27 apply to Larson or Hooten, Plaintiffs incorporate the arguments set forth herein.



1 NYSTRS is precisely the type of experienced fiduciary that Congress intended  
 2 to serve as Lead Plaintiff and prosecute claims on behalf of the putative class in this  
 3 action. Established in 1921, NYSTRS is the second largest public retirement system  
 4 in the state of New York and one of the 10 largest systems in the nation. NYSTRS  
 5 administers retirement, disability and death benefits for more than 400,000 current and  
 6 retired New York State public school teachers and administrators and manages assets  
 7 of approximately \$72 billion. *See* Declaration of Lead Plaintiff New York State  
 8 Teachers' Retirement System ("NYSTRS Declaration"), filed herewith, at ¶3.

9 On March 27, 2009, KPMG served its First Set of Requests for Production of  
 10 Documents to Plaintiffs ("First Request"). KPMG's First Request contains *sixty-nine*  
 11 separate enumerated requests seeking broad categories of documents, many of which  
 12 have no bearing whatsoever on any claim or defense in this litigation.<sup>4</sup> Similarly,  
 13 many of KPMG's requests are not constrained by any time or subject matter limitation  
 14 that relates to any issue in this action. Accordingly, KPMG's requests are not  
 15 calculated to lead to the discovery of admissible evidence but rather appear designed  
 16 to harass the Lead Plaintiff or to conduct a "fishing expedition" without any regard for  
 17 the burdens placed on NYSTRS, as demonstrated in the NYSTRS Declaration at ¶¶9-  
 18 12.

19 NYSTRS, like thousands of other class members, was an investor in New  
 20 Century publicly traded common stock. Appropriate discovery to NYSTRS should be  
 21 focused on its investment in New Century stock. Yet, KPMG's broad requests  
 22 apparently seek documents that generally relate to *all* of NYSTRS's investments in *all*  
 23 types of securities, and are not limited to investments in New Century or even the  
 24 subject matter of this litigation. *See, e.g.*, Request Nos. 11, 21-23, 26-32. Despite  
 25

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26 <sup>4</sup> By comparison, other Defendants served a total of *thirteen* separate enumerated  
 27 requests on Plaintiffs. *See*, Declaration of Elizabeth Lin In Opposition To KPMG  
 28 LLP's Motion to Compel ("Lin Declaration"), Ex. A.



1 NYSTRS's agreement and willingness to produce responsive documents that relate to  
2 NYTSRS's New Century investment or to this litigation, KPMG persists in this  
3 motion, claiming that documents which admittedly have no connection to New  
4 Century **may** be relevant to: (i) NYSTRS's understanding of "investment risks" or  
5 "market warnings"; (ii) the "sources or causes to which NYSTRS attributed its losses  
6 in certain investments"; or (iii) NYSTRS's use of indexed investing. KPMG further  
7 claims that documents concerning NYSTRS's investments generally may provide  
8 "insight into NYSTRS's general investment philosophies, strategies and procedures."

9 KPMG's arguments are inapposite. Courts routinely hold that a lead plaintiff's  
10 sophistication is irrelevant. Moreover, NYTSRS's losses in other investments have no  
11 bearing on its losses in New Century stock and KPMG fails to show any logical  
12 connection. In a securities fraud case where New Century stock traded on a public  
13 market, NYSTRS, like all other class members, is entitled to a presumption of reliance  
14 on the market. Accordingly, KPMG's discovery "can have no possible bearing on the  
15 claim or defense of a party." July 8, 2009 Order Re: Discovery Motion, at 2. This is  
16 especially true in this case where NYSTRS's investments in New Century and  
17 **hundreds** of other companies were made pursuant to an index approach, as opposed to  
18 any New Century-specific analysis.

19 The Federal Rules of Civil Procedure require courts to limit discovery that is  
20 "unreasonably cumulative or duplicative, or can be obtained from some other source  
21 that is more convenient, less burdensome, or less expensive," or where the burden or  
22 expense of the proposed discovery outweighs its likely benefit. Fed. R. Civ. P.  
23 26(b)(2)(C). Moreover, where – as here – discovery is sought to harass or oppress  
24 another party, the court should impose limitations. *See, e.g., Melendez v. Greiner*,  
25 2003 WL 22434101, at \*1 (S.D.N.Y. Oct. 23, 2003) (quoting *In re Six Grand Jury*  
26 *Witnesses*, 979 F.2d 939, 943 (2d Cir. 1992)).

KPMG's arguments are also disingenuous. Plaintiffs have not "amended" their responses and objections, but instead provided additional information in good faith in connection with the ongoing meet and confer process "to clarify and explain what NYSTRS will or will not produce." *See* July 8, 2009 letter from E. Lin to J. Lopez, attached to the Lopez Decl., Ex. F at 2. Moreover, contrary to KPMG's claims, Lead Plaintiff has not delayed the meet and confer process. KPMG's numerous and overly broad requests necessitated an extensive meet and confer process. Finally, KPMG insinuates that NYSTRS has not made a fulsome production because KPMG has so far produced "more" documents and because NYSTRS has not completed its production. This argument is without basis. Investors that serve as lead plaintiffs in securities class actions typically have few documents relevant to the claims and defenses in the litigation, other than their transaction records in the subject securities. *See* Lin Declaration, ¶16. Plaintiffs have diligently searched for and produced thousands of pages of documents, despite KPMG's pending motion to compel.

## **DISPUTED ISSUES**

### **1. Documents Plaintiffs Refuse To Produce On The Grounds of Relevancy And Undue Burden**

#### **(a) Requests Regarding NYSTRS's Board Of Trustee Meeting Minutes**

### **REQUEST FOR PRODUCTION NO. 11**

All minutes of NYSTRS' Board of Trustee meetings from January 1, 2005 to the present, including any and all DOCUMENTS that were provided to NYSTRS' Board of Trustees in connection with such meetings and/or memorialize all or part of a Board of Trustees meeting.

1 **RESPONSE TO REQUEST NO. 11**

2 Plaintiffs incorporate their General Objections and Objections to Definitions by  
3 reference. Plaintiffs object to this Request as irrelevant, overbroad, unduly  
4 burdensome, and not reasonably calculated to lead to the discovery of admissible  
5 evidence. Plaintiffs object to this Request to the extent it seeks disclosure of private  
6 or confidential information and documents. Plaintiffs object to this Request as  
7 burdensome and harassing to the extent that it seeks documents and information that  
8 are not relevant to the claims or defenses of any party in this litigation.

9 Subject to and without waiving any of the general and specific objections, Lead  
10 Plaintiff NYSTRS will produce relevant non-privileged documents, if any, from May  
11 5, 2005 to March 13, 2007 in their possession, custody or control that concern  
12 Plaintiffs' investment in New Century securities.

13 **JUNE 11 MODIFIED RESPONSE TO REQUEST NO. 11<sup>5</sup>**

14 NYSTRS will produce all minutes of NYSTRS' Board of Trustees meetings  
15 from January 1, 2005 to the present, including any and all documents that were  
16 provided to NYSTRS' Board of Trustees in connection with such meetings and/or  
17 memorialize all or part of a Board of Trustees meeting, to the extent the document  
18 concerns New Century or this litigation and is not privileged.

19 **A. KPMG'S POSITION**

20 **a. NYSTRS's Board of Trustees Minutes And Related Documents Are**  
21 **Discoverable And Must Be Produced**

22 NYSTRS's response to Request No. 11 impermissibly narrows the scope of the  
23 Request to only those documents concerning "New Century or this litigation," which  
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25 <sup>5</sup> Pursuant to its June 11, 2009 letter, Lead Plaintiff modified its original responses and  
26 objections to KPMG's Requests in its June 11, 2009 letter, following KPMG's May  
27 26, 2009 letter and the parties' June 5, 2009 meet and confer conference. *See* Lopez  
28 Decl., Exh. D at 100.

1 for all practical purposes means documents concerning New Century. According to  
2 NYSTRS, documents concerning KPMG's request, but that do not relate to New  
3 Century, are irrelevant and will not be produced. *See* Lopez Decl. ¶ 11; *see also*  
4 Lopez Decl., Exh. H, at 153. NYSTRS's position is unreasonable in light of the broad  
5 reach of discovery under the Federal Rules and this Court's prior orders.

6       Lead Plaintiff contends that the withheld documents do not concern New  
7 Century because the investments NYSTRS made in New Century were made pursuant  
8 to an indexing process. *See* Lopez Decl., Exh. G, at 142; Exh. H, at 153. Even if true,  
9 that reason does not insulate the withheld documents from discovery. To the contrary,  
10 NYSTRS's Board of Trustee meeting minutes and documents provided to the Board  
11 at or in advance of the meetings may be directly relevant to Plaintiffs' claims that  
12 KPMG's audit opinions regarding New Century contributed to the alleged losses they  
13 suffered in connection with their investments in New Century. Specifically, those  
14 documents—regardless of whether they relate to New Century—could demonstrate  
15 NYSTRS's understanding of the overall market conditions, investment risks, or  
16 market warnings of which NYSTRS was aware, or the sources or causes to which  
17 NYSTRS attributed its losses in certain investments, including in New Century  
18 securities or other mortgage-related investments. The document minutes may also  
19 confirm, explain, or refute NYSTRS's purported use and/or reliance upon the  
20 indexing processing and how that process affected NYSTRS's investments. Such  
21 documents may also provide insight into NYSTRS's general investment philosophies,  
22 strategies and procedures, which may have impacted NYSTRS's investment decisions  
23 concerning New Century securities.

24       It is well-settled that even where a party's board or committee meeting minutes  
25 do not directly address the claims at issue in the litigation, courts still permit discovery  
26 where, as here, such information could be potentially relevant to the claims or  
27 defenses of the parties. *See, e.g., Dowling v. American Hawaii Cruises*, 971 F.2d 423,  
28

1 427 (9th Cir. 1992) (committee meeting minutes were discoverable in their entirety  
2 “because the minutes contained material *potentially relevant* to [plaintiff’s] claim”)  
3 (emphasis added); *see also Nelson v. Production Credit Assoc. of the Midlands*, 1989  
4 U.S. Dist. LEXIS 16915, at \*11-12 (D. Neb. Mar. 22, 1989) (relevance objection to  
5 full disclosure of board of directors meeting minutes overruled where “[i]t is well  
6 established that relevance for purposes of discovery under the Federal Rules is  
7 construed more broadly than it is for purposes of trial.”).

8 For example, in *Flomo v. Bridgestone Americas Holding, Inc.*, the plaintiffs  
9 asserted claims regarding forced child labor and sought the minutes of the defendant’s  
10 board meetings. 2009 U.S. Dist. LEXIS 44535, at \*33-34 (S.D. Ind. May 20, 2009).  
11 The defendant limited its production of its minutes only to those “relevant to [the]  
12 lawsuit” and that referenced child labor. *Id.* The court rejected this limitation and  
13 ordered the production of all minutes on additional issues that “may provide  
14 admissible information” on the claims at issue in the litigation. *Id.* As in *Flomo*,  
15 Plaintiffs here impermissibly restricted the production of documents responsive to  
16 Request No. 11.

17 Moreover, as this Court previously held, the determination of whether a request  
18 for discovery is “relevant” is broadly construed and “should be allowed unless it is  
19 clear that the information sought can have no possible bearing on the claim or defense  
20 of a party.” July 8, 2009 Order Re: Discovery Motion, at 2; *see City of Rialto v. U.S.*  
21 *Dept. of Defense*, 492 F. Supp. 2d 1193, 1202 (C.D. Cal. 2007) (“a request for  
22 discovery should be considered relevant if there is any possibility that the information  
23 sought may be relevant to the claim or defense of any party.”); *see Miller v. Pancucci*,  
24 141 F.R.D. 292, 296 (C.D. Cal. 1992) (discovery may be had on “any matter that  
25 bears on, or that reasonably could lead to other matter that could bear on, any issue  
26 that is or may be in the case.” (citations omitted). Plaintiffs cannot contend that the  
27 withheld documents “have no possible bearing” on the claims and defenses asserted in  
28

1 this litigation. Hence, the Court should order Plaintiffs to produce *all* documents  
 2 responsive to this request.

3 **B. PLAINTIFFS' POSITION**

4 Without any subject matter limitation or regard for the burden placed on  
 5 NYSTRS, KPMG demands NYSTRS produce *all* minutes of its Board of Trustee  
 6 meetings from January 1, 2005, *to the present*, including *all* documents provided to  
 7 the Board in connection with such meetings. NYSTRS has agreed to produce all non-  
 8 privileged documents responsive to KPMG's Request No. 11 dated from January 1,  
 9 2005, to the present, to the extent such documents concern NYSTRS's investments in  
 10 New Century securities or this litigation.<sup>6</sup> Lead Plaintiff also has produced documents  
 11 relating more generally to NYSTRS's investment policies, including NYSTRS's  
 12 investment policy manuals. Nevertheless, in a complete fishing expedition, KPMG  
 13 seeks production of *all* NYSTRS's Board of Trustee meeting minutes and associated  
 14 documents *even if they do not concern New Century or this litigation*.

15 KPMG claims that such documents are relevant to its defense because the  
 16 documents "could demonstrate NYSTRS's understanding of the overall market  
 17 conditions, investment risks, or market warnings." This argument is without basis.  
 18 NYSTRS's investments in New Century stock were made pursuant to an indexing  
 19 approach, a form of "passive" investing by which groups of securities are selected in  
 20 an effort to mimic a particular market. *See* NYSTRS Declaration, at ¶8. Accordingly,  
 21 investments in New Century stock were made in reliance on the market price for New  
 22 Century stock (which is presumed to incorporate efficiently all public information),  
 23 not on "overall market conditions, investment risks, or market warnings." NYSTRS's  
 24 understanding of market conditions and investment risks therefore is irrelevant. *See*

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 26 <sup>6</sup> *See* June 11, 2009 letter from E. Lin to J. Lopez, attached to the Lopez Decl., Ex. D,  
 27 at 4; Aug. 24, 2009 letter from E. Lin to J. Lopez, attached to the Lopez Decl., Ex. J at  
 28 2.



1 *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 506 (9th Cir. 1992) (“Differences in  
 2 sophistication, etc., among purchasers have no bearing in the impersonal market fraud  
 3 context, because dissemination of false information necessarily translates through  
 4 market mechanisms into price inflation which harms each purchaser identically”);  
 5 *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975) (same).

6 Moreover, KPMG’s discovery is particularly overbroad and intrusive because it  
 7 is premised on a *mere speculation* that thousands of NYSTRS documents, admittedly  
 8 not related to investments in New Century securities or this litigation whatsoever,  
 9 somehow might still lead to the discovery of admissible evidence. “While Rule  
 10 26(b)(1) still provides for broad discovery, courts should not grant discovery requests  
 11 based on pure speculation that amount to nothing more than a ‘fishing expedition’.”  
 12 *Collens v. City of New York*, 222 F.R.D. 249, 253 (S.D.N.Y. 2004); *see also Surles v.*  
 13 *Air France*, 2001 U.S. Dist. LEXIS 10048, at \*11 (S.D.N.Y. July 9, 2001) (discovery  
 14 requests that are “based on pure speculation and conjecture” are not permissible).

15 To curb such improper discovery, the Court has broad discretion to determine  
 16 what discovery is relevant to the parties’ claims or defenses. *See Herbert v. Lando*,  
 17 441 U.S. 153, 177 (1979). Unquestionably, irrelevant information is not the proper  
 18 subject of discovery. *See Travers v. Shalala*, 20 F.3d 993, 999 (9th Cir. 1994); *see*  
 19 *also Blackie v. Barrack*, 524 F.2d at 906 (the Court should “reasonably control  
 20 discovery . . . to prevent fruitless fishing expeditions with little promise of success.”).  
 21 Here, because KPMG fails to explain how *all* of NYSTRS Board of Trustees meeting  
 22 minutes and associated documents for meetings that do not concern New Century or  
 23 this litigation relate to any claim or defense or are likely to lead to the discovery of  
 24 admissible evidence, KPMG’s request should be denied. The unfair burden on  
 25 NYSTRS is set forth in the accompanying NYSTRS Declaration at ¶¶10-11.

26 Importantly, KPMG has cited no case in which a plaintiff in a securities action  
 27 was required to produce its Board minutes. The authorities cited by KPMG are



1 wholly inapposite and provide no support for KPMG’s arguments. For example, in  
 2 *Dowling v. American Hawaii Cruises*, the Ninth Circuit held that a district court erred  
 3 in not permitting plaintiff – a crewman on defendant’s cruise liner – discovery of the  
 4 defendant’s pre-accident safety committee meeting minutes based on a finding of  
 5 “self-critical analysis privilege.” 971 F.2d 423 (9th Cir. 1992). The Ninth Circuit  
 6 further observed that the discovery of the minutes was appropriate because they  
 7 directly related to the plaintiff’s claims concerning the same oil leak that plaintiff  
 8 alleged caused his injury. *Id.* at 427 (information regarding a company’s prior  
 9 response to the same hazard that plaintiff alleged caused his injury “will be invaluable  
 10 to a plaintiff attempting to prove his injury was caused by the company’s negligent  
 11 failure to make safe a hazardous condition.”). Here, NYSTRS has agreed to produce  
 12 all nonprivileged Board minutes and documents concerning New Century. KPMG  
 13 cannot show how meeting minutes that do not relate to New Century or this litigation  
 14 could possibly be relevant to any claim or defense.<sup>7</sup>

15 KPMG also mischaracterizes the holding in other cited authority. *Flomo v.*  
 16 *Bridgestone Americas Holding, Inc.*, 2009 U.S. Dist. LEXIS 44535 (S.D. Ind.  
 17 May 20, 2009), cited by KPMG in support of its arguments regarding Request No. 11,  
 18 resolved numerous disputed discovery requests in a case concerning child labor at  
 19 defendant’s plantations in Liberia and claims under the Alien Tort Statute, 28 U.S.C.  
 20 § 1350 and applicable international conventions. In that case, defendants had limited  
 21 their search to “board minutes about child labor.” *Id.* at \*33. Contrary to KPMG’s  
 22 characterization, the court did not order a blanket production of *all* board minutes but  
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24 <sup>7</sup> Similarly, KPMG’s citation to *Nelson v. Production Credit Assoc. of the Midlands*,  
 25 1989 U.S. Dist. LEXIS 16915 (D. Neb. Mar. 22, 1989) is inapposite. There the court  
 26 granted a party’s motion to compel production of documents from a nonparty served  
 27 with a Rule 45 subpoena where the nonparty failed to serve written objections or  
 28 move to quash. *Id.* at \*11-12. The holding has no bearing on this dispute.

1 instead ordered the defendant to search for certain “additional responsive documents,”  
2 such as minutes discussing agreements or other interactions with the Liberian  
3 government. *Id.* at \*34. Here, NYSTRS has agreed to produce Board minutes, if  
4 there are any, that concern its investment in New Century or this litigation. KPMG  
5 provides no cogent rationale why additional Board minutes that do not relate to  
6 NYSTRS’s investment in New Century common stock or this litigation are likely to  
7 lead to the discovery of admissible evidence. Indeed, as set forth in NYSTRS’s  
8 Declaration, NYSTRS’s Board of Trustee is not responsible for the day-to-day  
9 functioning of NYSTRS and had no involvement in the individual investments that  
10 are made under the indexing approaches, such as NYSTRS’s transactions in New  
11 Century common stock. *See* NYSTRS Declaration, ¶10. The Board of Trustees did  
12 not review individual New Century stock positions or purchases or sales. *Id.*

13       Production requests are unduly burdensome where the burden on the producing  
14 party outweighs the value of the information to the party seeking the discovery. *See*  
15 *Anderson v. Abercrombie & Fitch Stores, Inc.*, 2007 U.S. Dist. LEXIS 47795, at \*6  
16 (S.D. Cal. July 2, 2007). Factors such as relevance, the party’s need for the  
17 documents, the breadth of the request, and the particularity of the description of the  
18 documents sought are all components of the court’s analysis. *Id.* at \*6; *see also*  
19 *Compaq Computer Corp. v. Packard Bell Elec. Inc.*, 163 F.R.D. 329, 337 (N.D. Cal.  
20 1995) (limiting scope of overbroad requests); *Moon v. SCP Pool Corp.*, 232 F.R.D.  
21 633, 637-38 (C.D. Cal. 2005) (finding unduly burdensome document requests that  
22 spanned a time frame and subject matter beyond those at issue in the complaint).

23       Here, KPMG’s requests – if not limited to NYSTRS’s investments in New  
24 Century securities or this litigation – would require NYSTRS to incur significant  
25 burden in attempting to identify and collect all documents which may have been  
26 provided to the Board of Trustees to the present, whether from NYSTRS’s actuarial,  
27 legal, investment, benefits, finance or other areas. *See* NYSTRS Declaration, at ¶10.

1 Additionally, requiring NYSTRS's staff to search for documents responsive to  
2 KPMG's request would require diverting valuable time from other important matters,  
3 including not only investment transactions but, for example, legislation, benefits  
4 issues, purchasing questions and human resource issues. *Id.*, at ¶11. NYSTRS would  
5 have to devote hundreds of person-hours to search various files and records for  
6 documents, including determining whether documents are retained on-site or have  
7 been placed in off-site storage. *Id.*

8 Thus, responding to KPMG's requests would require NYSTRS to disrupt its  
9 business to search the files of numerous employees from numerous locations and  
10 collect and produce all of its Board of Trustee meeting minutes and related documents  
11 for nearly five years, all in a search for documents that are entirely irrelevant to this  
12 litigation. Accordingly, the burden on NYSTRS and disruption to its business far  
13 outweigh any remote relevance of these documents to any claim or defense in this  
14 action.

15  
16  
17 **(b) Requests Regarding NYSTRS's Investment Committees and**  
18 **Advisors And Investment Vehicles Described In NYSTRS's**  
19 **Annual Reports**

20 **REQUEST FOR PRODUCTION NO. 21**

21 All DOCUMENTS that refer or relate to any policy, practice, procedure and/or  
22 strategy relating to the following investment vehicles described in the "Notes to  
23 Financial Statements" section of YOUR annual financial report for the fiscal years  
24 ended June 30, 2006 and June 30, 2007: (1) "Mortgage pass-through certificates,  
25 provided the certificates evidence ownership of undivided interests in pools or  
26 mortgage loans secured by first mortgages on real property located in New York  
27

1 improved by one-to-four family residential dwellings, and, provided further, that (i)  
2 such mortgage loans are originated on or after January 1, 1980, by any bank, trust  
3 company, national banking association, savings bank, federal mutual savings bank,  
4 savings and loan association, federal savings and loan association, credit union, or  
5 federal credit union authorized to do business in New York State or by any lender  
6 approved by the Secretary of Housing and Urban Development for participation in any  
7 mortgage insurance program under the National Housing Act, (ii) such mortgage loans  
8 are assigned to a bank, trust company, federal mutual savings bank or federal savings  
9 and loan association as trustee for the benefit of holders of such certificates, and (iii)  
10 such certificates are rated within the three highest grades by an independent rating  
11 service designated by the banking board. The aggregate unpaid principal on  
12 conventional mortgages securing mortgage pass-through certificates cannot exceed  
13 10% of the assets of the System nor can the total unpaid principal on any single pool  
14 of conventional mortgages securing mortgage pass-through certificates exceed 1% of  
15 the assets of the System;" and (2) "Collateralized Mortgage Obligations, which meet  
16 the requirements of applicable statutes."

17 **RESPONSE TO REQUEST NO. 21**

18 Plaintiffs incorporate their General Objections and Objections to Definitions by  
19 reference. Plaintiffs object to this Request as irrelevant, overbroad, unduly  
20 burdensome, and not reasonably calculated to lead to the discovery of admissible  
21 evidence. Plaintiffs object to this Request on the grounds that it is compound and  
22 incomprehensible. Plaintiffs object to this Request to the extent it seeks disclosure of  
23 private or confidential information and documents. Plaintiffs object to this Request as  
24 burdensome and harassing to the extent that it seeks documents and information that  
25 are not relevant to the claims or defenses of any party in this litigation.

26 Subject to and without waiving any of the general and specific objections, Lead  
27 Plaintiff NYSTRS will produce relevant non-privileged documents, if any, responsive  
28

1 to this Request in their possession, custody or control from May 5, 2005 to March 13,  
2 2007.

3 **JUNE 11 MODIFIED RESPONSE TO REQUEST NO. 21**

4 NYSTRS is presently not aware of documents responsive to this Request that  
5 are relevant (*i.e.*, relate to its investment in New Century or this litigation). This  
6 Request otherwise amounts to a fishing expedition, as it requests documents relating  
7 to securities that are irrelevant to this case.

8 **REQUEST FOR PRODUCTION NO. 22**

9 All DOCUMENTS that refer or relate to YOUR investment strategy and/or  
10 policy relating to investments made pursuant to the “Leeway Clause” of Section 177,  
11 as quoted in the “Deposit and Investment Risk Disclosure” section of YOUR annual  
12 financial report for the fiscal year ended June 30, 2006.

13 **RESPONSE TO REQUEST NO. 22**

14 Plaintiffs incorporate their General Objections and Objections to Definitions by  
15 reference. Plaintiffs object to this Request as overbroad, unduly burdensome, and not  
16 reasonably calculated to lead to the discovery of admissible evidence. Plaintiffs  
17 object to this Request to the extent it seeks disclosure of private or confidential  
18 information and documents. Plaintiffs object to this Request as burdensome and  
19 harassing to the extent that it seeks documents and information that are not relevant to  
20 the claims or defenses of any party in this litigation.

21 Subject to and without waiving any of the general and specific objections, Lead  
22 Plaintiff NYSTRS did not make any investments in New Century securities pursuant  
23 to the “Leeway Clause” referred to in the Request.

24 **JUNE 11 MODIFIED RESPONSE TO REQUEST NO. 22**

25 NYSTRS is presently not aware of documents responsive to this Request that  
26 are relevant (*i.e.*, relate to its investment in New Century or this litigation). As set  
27 forth in NYSTRS’ April 29, 2009 Responses and Objections to the Requests and as  
28

1 discussed in the June 5, 2009 meet and confer, NYSTRS did not make any  
2 investments in New Century securities pursuant to the Leeway Clause. This Request  
3 otherwise amounts to a fishing expedition, as it requests documents that are irrelevant  
4 to this case.

5 **REQUEST FOR PRODUCTION NO. 23**

6 All DOCUMENTS that refer or relate to YOUR investment strategy and/or  
7 policy relating to investments made pursuant to the “Leeway Clause” of Section 177,  
8 as quoted in the “Deposit and Investment Risk Disclosure” section of YOUR annual  
9 financial report for the fiscal year ended June 30, 2007.

10 **RESPONSE TO REQUEST NO. 23**

11 Plaintiffs incorporate their General Objections and Objections to Definitions by  
12 reference. Plaintiffs object to this Request as overbroad, unduly burdensome, and not  
13 reasonably calculated to lead to the discovery of admissible evidence. Plaintiffs  
14 object to this Request to the extent it seeks disclosure of private or confidential  
15 information and documents. Plaintiffs object to this Request on the grounds that it is  
16 vague and ambiguous. Plaintiffs object to this Request as burdensome and harassing  
17 to the extent that it seeks documents and information that are not relevant to the  
18 claims or defenses of any party in this litigation.

19 Subject to and without waiving any of the general and specific objections, Lead  
20 Plaintiff NYSTRS did not make any investments in New Century securities pursuant  
21 to the “Leeway Clause” referred to in the Request.

22 **JUNE 11 MODIFIED RESPONSE TO REQUEST NO. 23**

23 NYSTRS is presently not aware of documents responsive to this Request that  
24 are relevant (i.e., relate to its investment in New Century or this litigation). As set  
25 forth in NYSTRS’ April 29, 2009 Responses and Objections to the Requests and as  
26 discussed in the June 5, 2009 meet and confer, NYSTRS did not make any  
27 investments in New Century securities pursuant to the Leeway Clause. This Request  
28



otherwise amounts to a fishing expedition, as it requests documents that are irrelevant to this case.

### **REQUEST FOR PRODUCTION NO. 26**

All DOCUMENTS from January 1, 2005 to the present that refer or relate to mortgage investments that were acquired under the Leeway Clause, as discussed in the “Real Estate and Mortgages” section of the “Notes to Financial Statements” in YOUR annual financial report for the fiscal years ended June 30, 2006 and June 30, 2007.

### **RESPONSE TO REQUEST NO. 26**

Plaintiffs incorporate their General Objections and Objections to Definitions by reference. Plaintiffs object to this Request on the grounds that it is overbroad, unduly burdensome, irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. Plaintiffs further object to this Request to the extent it seeks disclosure of private or confidential information and documents. Plaintiffs also object to this Request on the grounds that it is vague and ambiguous. Plaintiffs object to this Request as burdensome and harassing to the extent that it seeks documents and information that are not relevant to the claims or defenses of any party in this litigation.

Subject to and without waiving any of the general and specific objections, Lead Plaintiff NYSTRS did not make any investments in NEW SECURITY pursuant to the “Leeway Clause” referred to in the Request.

### **JUNE 11 MODIFIED RESPONSE TO REQUEST. NO. 26**

NYSTRS is presently not aware of documents responsive to this Request that are relevant (i.e., relate to its investment in New Century or this litigation). As set forth in NYSTRS’ April 29, 2009 Responses and Objections to the Requests and as discussed in the June 5, 2009 meet and confer, NYSTRS did not make any investments in New Century securities pursuant to the Leeway Clause. This Request



otherwise amounts to a fishing expedition, as it requests documents that are irrelevant to this case.

**REQUEST FOR PRODUCTION NO. 27**

All DOCUMENTS from January 1, 2005 to the present created by or received from, either directly or indirectly, and/or all COMMUNICATIONS with, NYSTRS' Investment Advisory Committee.

**RESPONSE TO REQUEST NO. 27**

Plaintiffs incorporate their General Objections and Objections to Definitions by reference. Plaintiffs object to this Request as irrelevant, overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Plaintiffs further object to this Request to the extent it seeks disclosure of private or confidential information and documents. Plaintiffs object to this Request as burdensome and harassing to the extent that it seeks documents and information that are not relevant to the claims or defenses of any party in this litigation.

Subject to and without waiving any of the general and specific objections, Lead Plaintiff NYSTRS will produce relevant non-privileged documents, if any, in their possession, custody or control from May 5, 2005 to March 13, 2007 responsive to this Request.

**JUNE 11 MODIFIED RESPONSE TO REQUEST NO. 27**

NYSTRS is presently not aware of any documents responsive to this Request that are relevant (i.e., relate to its investment in New Century or this litigation). If any such non-privileged documents are found to exist from January 1, 2005 to the present, NYSTRS will produce them.

**REQUEST FOR PRODUCTION NO. 28**

All DOCUMENTS, including but not limited to, notes, minutes, and/or agendas, from January 1, 2005 to the present that refer or relate to any meeting of the NYSTRS' Investment Advisory Committee, including any and all DOCUMENTS that

1 were provided to the Investment Advisory Committee in advance of or at such  
2 meetings.

3 **RESPONSE TO REQUEST NO. 28**

4 Plaintiffs incorporate their General Objections and Objections to Definitions by  
5 reference. Plaintiffs object to this Request as irrelevant, overbroad, unduly  
6 burdensome, and not reasonably calculated to lead to the discovery of admissible  
7 evidence. Plaintiffs further object to this Request as burdensome to the extent it calls  
8 for documents not within Plaintiffs' possession, custody or control. Plaintiffs object  
9 to this Request as burdensome and harassing to the extent that it seeks documents and  
10 information that are not relevant to the claims or defenses of any party in this  
11 litigation.

12 Subject to and without waiving any of the general and specific objections, Lead  
13 Plaintiff NYSTRS will produce relevant non-privileged documents, if any, in their  
14 possession, custody or control from May 5, 2005 to March 13, 2007 responsive to this  
15 Request.

16 **JUNE 11 MODIFIED RESPONSE TO REQUEST NO. 28**

17 NYSTRS is presently not aware of any documents responsive to this Request  
18 that are relevant (i.e., relate to its investment in New Century or this litigation). If any  
19 such non-privileged documents are found to exist from January 1, 2005 to the present,  
20 NYSTRS will produce them.

21 **REQUEST FOR PRODUCTION NO. 29**

22 All DOCUMENTS from January 1, 2005 to the present created by or received  
23 from, either directly or indirectly, and/or all COMMUNICATIONS with, NYSTRS'  
24 Real Estate Advisory Committee.

25 **RESPONSE TO REQUEST NO. 29**

26 Plaintiffs incorporate their General Objections and Objections to Definitions by  
27 reference. Plaintiffs object to this Request as irrelevant, overbroad, unduly

1 burdensome, and not reasonably calculated to lead to the discovery of admissible  
2 evidence. Plaintiffs object to this Request to the extent it seeks disclosure of private  
3 or confidential information and documents. Plaintiffs object to this Request as  
4 burdensome and harassing to the extent that it seeks documents and information that  
5 are not relevant to the claims or defenses of any party in this litigation.

6 Subject to and without waiving any of the general and specific objections, Lead  
7 Plaintiff NYSTRS will produce relevant non-privileged documents, if any, in their  
8 possession, custody or control from May 5, 2005 to March 13, 2007 responsive to this  
9 Request.

10  
11 **JUNE 11 MODIFIED RESPONSE TO REQUEST NO. 29**

12 NYSTRS is presently not aware of documents responsive to this Request that  
13 are relevant (i.e., relate to its investment in New Century or this litigation). If any  
14 such non-privileged documents are found to exist from January 1, 2005 to the present,  
15 NYSTRS will produce them.

16 **REQUEST FOR PRODUCTION NO. 30**

17 All DOCUMENTS, including but not limited to, notes, minutes, and/or  
18 agendas, from January 1, 2005 to the present that refer or relate to any meeting of the  
19 NYSTRS' Real Estate Advisory Committee, including any and all DOCUMENTS  
20 that were provided to the Real Estate Advisory Committee in advance of or at such  
21 meetings.

22 **RESPONSE TO REQUEST NO. 30**

23 Plaintiffs incorporate their General Objections and Objections to Definitions by  
24 reference. Plaintiffs object to this Request as overbroad, unduly burdensome, and not  
25 reasonably calculated to lead to the discovery of admissible evidence. Plaintiffs  
26 object to this Request to the extent it seeks disclosure of private or confidential  
27 information and documents. Plaintiffs object to this Requests as burdensome to the

1 extent it calls for documents not within Plaintiffs' possession, custody or control.  
2 Plaintiffs object to this Request as burdensome and harassing to the extent that it seeks  
3 documents and information that are not relevant to the claims or defenses of any party.

4 Subject to and without waiving any of the general and specific objections, Lead  
5 Plaintiff NYSTRS will produce relevant non-privileged documents, if any, in their  
6 possession, custody or control from May 5, 2005 to March 13, 2007 responsive to this  
7 Request.

8  
9  
10 **JUNE 11 MODIFIED RESPONSE TO REQUEST NO. 30**

11 NYSTRS is presently not aware of documents responsive to this Request that  
12 are relevant (i.e., relate to its investment in New Century or this litigation). If any  
13 such non-privileged documents are found to exist from January 1, 2005 to the present,  
14 NYSTRS will produce them.

15 **REQUEST FOR PRODUCTION NO. 31**

16 All DOCUMENTS from January 1, 2005 to the present created by or received  
17 from, either directly or indirectly, and/or all COMMUNICATIONS with, NYSTRS'  
18 REIT Real Estate Advisors, including but not limited to, DOCUMENTS from and/or  
19 COMMUNICATIONS with Adelante Capital Management LLC, Cohen & Steers  
20 Capital Management, Inc. and/or RREEF America, LLC.

21 **RESPONSE TO REQUEST NO. 31**

22 Plaintiffs incorporate their General Objections and Objections to Definitions by  
23 reference. Plaintiffs object to this Request as overbroad, unduly burdensome, and not  
24 reasonably calculated to lead to the discovery of admissible evidence. Plaintiffs  
25 object to this Request as burdensome and harassing to the extent that it seeks  
26 documents and information that are not relevant to the claims or defenses of any party.

1 Subject to and without waiving any of the general and specific objections, Lead  
2 Plaintiff NYSTRS will produce relevant non-privileged documents, if any, in their  
3 possession, custody or control from May 5, 2005 to March 13, 2007 responsive to this  
4 Request.

5 **JUNE 11 MODIFIED RESPONSE TO REQUEST. NO. 31**

6 NYSTRS is presently not aware of documents responsive to this Request that  
7 are relevant (i.e., relate to its investment in New Century or this litigation). If any  
8 such non-privileged documents are found to exist from January 1, 2005 to the present,  
9 NYSTRS will produce them.

10 **REQUEST FOR PRODUCTION NO. 32**

11 All DOCUMENTS, including but not limited to, notes, minutes, and/or  
12 agendas, from January 1, 2005 to the present that refer or relate to any meeting of  
13 NYSTRS' REIT Real Estate Advisors.

14 **RESPONSE TO REQUEST NO. 32**

15 Plaintiffs incorporate their General Objections and Objections to Definitions by  
16 reference. Plaintiffs object to this Request as overbroad, unduly burdensome, and not  
17 reasonably calculated to lead to the discovery of admissible evidence. Plaintiffs  
18 object to this Request as burdensome and harassing to the extent that it seeks  
19 documents and information that are not relevant to the claims or defenses of any party.

20 Subject to and without waiving any of the general and specific objections, Lead  
21 Plaintiff NYSTRS will produce relevant non-privileged documents, if any, in their  
22 possession, custody or control from May 5, 2005 to March 13, 2007 responsive to this  
23 Request.

24 **JUNE 11 MODIFIED RESPONSE TO REQUEST NO. 32**

25 NYSTRS is presently not aware of documents responsive to this Request that  
26 are relevant (i.e., relate to its investment in New Century or this litigation). If any  
27

such non-privileged documents are found to exist from January 1, 2005 to the present, NYSTRS will produce them.

**A. KPMG'S POSITION**

**1. Documents Concerning NYSTRS's Investment Vehicles, Advisors, or Committees Are Relevant And Discoverable**

Similar to their response to Request No. 11, NYSTRS also impermissibly narrows the scope of Request Nos. 21-23 and 26-32 to only those documents concerning "its investment in New Century or this litigation." Again, NYSTRS claims that because its investments in New Century were made pursuant to an indexing process, any documents regarding its investment vehicles, advisors, or committees described in the Requests are irrelevant. *See* Lopez Decl., Exh. G, at 144. As before, NYSTRS's position is unreasonable in light of this Court's previous orders and the broad reach of discovery.

According to NYSTRS's annual reports, the investment vehicles, committees, and advisors employed by NYSTRS may have provided information by which NYSTRS invested in real estate and mortgage-related securities. Documents responsive to those Requests may thus provide insight into NYSTRS's general investment philosophy or strategy concerning such securities. The Requests regarding those issues are thus, at the very least, reasonably calculated to lead to admissible evidence, and NYSTRS's relevancy objection is simply without merit.

Nonetheless, in an effort to resolve this issue without this Court's intervention, KPMG proposed a narrowed request for NYSTRS to produce:

[A]ll documents, including but not limited to, communications, concerning NYSTRS' Investment Advisory Committee, Real Estate Advisory Committee, and REIT Real Estate Advisors from January 1, 2005 to the present to the extent that the documents refer or relate to [NYSTRS's] investments in mortgage-related investment vehicles, companies, and REITS, including but not limited to, documents sufficient

1 to show the risk profiles of the investments and/or entities in which  
2 [NYSTRS] invested and any analysis or due diligence [NYSTRS]  
3 performed on these investments and/or entities.

4 Lopez Decl., Exh. E, at 126.

5 NYSTRS refused this compromise, instead continuing with their assertion that  
6 the requested documents were not relevant and would be overly burdensome to  
7 produce. *See* Lopez Decl., Exh. F, at 137; Exh. G, at 144; Exh. H, at 154.

8 Multiple courts have permitted discovery of such documents. *See, e.g., In re*  
9 *Acceptance Ins. Co. Sec. Litig.*, 2002 U.S. Dist. LEXIS 27681, at \*13 (D. Neb. Aug.  
10 2, 2002) (documents concerning named plaintiffs' complete investment and trading  
11 history were directly relevant to the allegations that defendants perpetrated a fraud on  
12 the market by making false and misleading statements during the class period); *In re*  
13 *Grand Casinos, Inc. Sec. Litig.*, 181 F.R.D. 615, 620 (D. Minn. 1998) ("[P]roposed  
14 discovery of Lead Plaintiffs' investment histories and strategies could lead to the  
15 discovery of admissible evidence; namely, evidence which could serve to rebut any  
16 presumption that they relied upon the integrity of the market."); *In re Harcourt Brace*  
17 *Jovanovich, Inc. Sec. Litig.*, 838 F. Supp. 109, 114 (S.D.N.Y. 1993) (discovery  
18 relating to a named plaintiff's investment history was proper where reliance on alleged  
19 misrepresentations and omissions was alleged in Rule 10b-5 claim). Further, as  
20 discussed above, the determination of whether a request for discovery is "relevant" is  
21 broadly construed and "should be allowed unless it is clear that the information sought  
22 can have no possible bearing on the claim or defense of a party." July 8, 2009 Order  
23 Re: Discovery Motion, at 2. It cannot be said that the documents sought by Request  
24 Nos. 21-23 and 26-32 "have no possible bearing" on KPMG's claims and defenses in  
25 this litigation. To the contrary, discovery pertaining to NYSTRS's prior investment  
26 history, strategy, practice, or decisions are relevant to an understanding of NYSTRS's  
27 sophistication, knowledge, investment preferences, and risk tolerance. Moreover,



1 KPMG should have the opportunity to rebut Plaintiffs' purported reliance on KPMG's  
 2 alleged misstatements, using information obtained through discovery of NYSTRS's  
 3 investment history, strategies, and practices.

4 Documents responsive to Request Nos. 21-23 and 26-32 may also bear upon the  
 5 class action allegations in the Complaint. For example, documents concerning  
 6 NYSTRS's investment history, strategy, and practice may be probative of NYSTRS's  
 7 sophistication as an investor and alleged reliance (or not) on KPMG's purported  
 8 misstatements, particularly as to mortgage-related investments (of which NYSTRS's  
 9 investments in New Century were a part). Such issues may subject NYSTRS to  
 10 unique defenses not typical of the class, which would thus make NYSTRS an  
 11 inadequate class representative. *See* Fed. R. Civ. P. 23(a) ("claims or defenses of the  
 12 representative parties [must be] typical of the claims or defenses of the class"); *In re*  
 13 *Connetics Corp. Sec. Litig.*, 257 F.R.D. 572, 576 (N.D. Cal. 2009) (class certification  
 14 is inappropriate where a putative class representative is subject to unique defenses); *In*  
 15 *re Quaterdeck Office Sys., Inc. Sec. Litig.*, 1993 U.S. Dist. LEXIS 19806, at \*12 (C.D.  
 16 Cal. Sept. 30, 1993) (same); *see also In re Vesta Ins. Group, Inc.*, 1999 U.S. Dist.  
 17 LEXIS 23541, at \*14-15 (N.D. Ala. May 28, 1999); *In re ML-Lee Acquisition Fund*  
 18 *II, L.P.*, 149 F.R.D. 506, 508 (D. Del. 1993) (court ordered production of documents  
 19 pertaining to the plaintiffs' investment history because they were relevant to the  
 20 court's determination of whether plaintiffs satisfied the Rule 23 typicality  
 21 requirement); *Goldman v. Alhadeff*, 1990 U.S. Dist. LEXIS 11808, at \*4-6 (W.D.  
 22 Wash. Jan 31, 1990) (discovery related to plaintiffs' "investment portfolio and  
 23 transactions," was allowed because it was relevant to the lead plaintiff's level of  
 24 sophistication, which is a unique defense precluding class certification).

25 Accordingly, the Court should reject NYSTRS's relevancy objection as to  
 26 Request Nos. 21-23 and 26-32 and compel the production of all withheld documents.

## 2. NYSTRS's Undue Burden and Privacy Objections Lack Merit

NYSTRS also objects to the production of documents responsive to Request Nos. 21-23 and 26-32 on the grounds that the requests are overly burdensome and seek disclosure of private or confidential information. *See* Lopez Decl., Exh. H, at 154; Exh. J, at 167. NYSTRS, however, provided no facts to KPMG supporting its claim that the request is unduly burdensome. *See* Lopez Decl., Exh. H, at 144; Exh. J, at 167. Plaintiff's "burden" objection should thus be stricken. *See* July 8, 2009 Order Re: Discovery Motion, at 8 ("it is well-established that the burden is on the objecting party to show grounds for failing to provide the requested discovery."); *Hill v. Eddie Bauer*, 242 F.R.D. 556, 561 (C.D. Cal. 2007) (courts will disregard a party's unexplained boilerplate objections). Furthermore, courts reject undue burden objections by institutional investors like NYSTRS regarding requests for their investment portfolios and investment histories where, as here, the requested documents are relevant. *See, e.g., In re Vesta Ins. Group, Inc.*, 1999 U.S. Dist. LEXIS 23541, at \*17 (overruling overbroad and undue burden objections of lead plaintiffs who claimed to administer \$103 billion and \$40 million in investments in various securities).

The Court should also reject NYSTRS's privacy objections to Request Nos. 21-23 and 26-32. Courts typically reject privacy objections to requests for a party's investment history where the requests are limited to the investment history of the responding party and do not seek information from entities or persons not a part of the plaintiff class. *See In re Vesta Ins. Group, Inc.*, 1999 U.S. Dist. LEXIS 23541, at \*17-18; *see also In re Grand Casinos*, 181 F.R.D. at 621 (court ordered production of lead plaintiffs' investment histories but refused to compel production of the investment histories of third parties). As acknowledged by NYSTRS, KPMG's Requests here seek only the investment history and strategies of NYSTRS. *See* Lopez Decl., Exh. H, at 154. ("[A]ny possible relevance of these overly broad Requests is

1 outweighed by . . . the inappropriate invasion into the *investment practices of NYSTRS*  
 2 that are wholly unrelated to its investment in New Century.”) (emphasis added).

3 Accordingly, this Court should reject NYSTRS’s privacy objection and compel  
 4 NYSTRS’s production of documents responsive to Request Nos. 21-23 and 26-32.

5 **B. PLAINTIFFS’ POSITION**

6 Without any regard for its lack of relevance to this case, the enormous burden  
 7 on NYSTRS (see NYSTRS Declaration at ¶¶10-12, 20) or privacy considerations,  
 8 KPMG seeks broad-ranging discovery that admittedly has absolutely nothing to do  
 9 with NYSTRS’s investments in New Century stock concerning:

- 10 • NYSTRS’s investments in mortgage pass-through certificates and  
 11 collateralized mortgage obligations (Request No. 21);
- 12 • NYSTRS’s investment strategy and/or policy relating to investments  
 13 made or acquired pursuant to the “Leeway Clause,” as referenced in  
 14 NYSTRS’s annual financial reports for the fiscal years ended June 30,  
 15 2006, and June 30, 2007 (Request Nos. 22, 23, 26);
- 16 • NYSTRS’s Investment Advisory Committee (Request Nos. 27, 28);
- 17 • NYSTRS’s Real Estate Advisory Committee (Request Nos. 29, 30); and
- 18 • NYSTRS’s REIT Real Estate Advisors (Request Nos. 31, 32).

19 Notably, NYSTRS has agreed to produce responsive documents, if there are  
 20 any, to the extent such documents relate to New Century or this litigation. Among the  
 21 responsive documents, NYSTRS has already produced its trading records in New  
 22 Century stock, as well as its annual financial reports, its reports of equity holdings,  
 23 and its investment policy manuals. Appropriate discovery into NYSTRS’s investment  
 24 history and policies should be limited, as it is in most securities fraud class actions, to  
 25 NYSTRS’s transactions in New Century stock – the securities that are the subject of  
 26 this litigation.

1 In seeking *all* documents concerning investments other than New Century,  
2 KPMG makes conclusory arguments and presumes – without any factual support –  
3 that NYSTRS’s investments in real estate- or mortgage-related securities will “provide  
4 insight into NYSTRS’s general investment philosophy or strategy concerning such  
5 securities.” KPMG fails to make any connection to any claim or defense in this  
6 action.

7 Discovery regarding NYSTRS’s investments made pursuant to the “Leeway  
8 Clause” is irrelevant, because NYSTRS did not invest in New Century common stock  
9 pursuant to the “Leeway Clause.” *See* Lin Declaration, at ¶15; *see also* NYSTRS  
10 Declaration, at ¶¶8, 21. KPMG provides no explanation of how discovery into  
11 investments made pursuant to the “Leeway Clause” might lead to the discovery of  
12 admissible evidence relevant to any claim or defense in this action. Further,  
13 Plaintiffs’ Lead Counsel has explained that NYSTRS’s investment in New Century  
14 stock was not based on New Century’s status as a REIT, and that NYSTRS’s  
15 investment in New Century stock did not involve its Investment Advisory Committee,  
16 Real Estate Advisory Committee or REIT Real Estate Advisors. *See* Lin Declaration,  
17 at ¶15; *see also* NYSTRS Declaration, at ¶¶13-19.

18 Nevertheless, KPMG contends that responsive documents may provide an  
19 understanding of NYSTRS’s overall practice and/or strategy for investing in  
20 mortgage-related vehicles “like New Century.” KPMG’s argument fails for at least  
21 three reasons.

22 First, NYSTRS’s claims are based on transactions in New Century *common*  
23 *stock* during the Class Period (*see* NYSTRS certification, attached as Ex. A to the  
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1 Complaint), not investments in “mortgage-related investment vehicles,” such as a  
 2 collateralized debt obligation. Complaint at ¶19.<sup>8</sup>

3 Second, NYSTRS’s investment in New Century was made pursuant to an index  
 4 investing approach, not as part of some “mortgage-related” investment strategy.

5 Third, NYSTRS’s investment philosophy regarding mortgage-related  
 6 investments is not at issue in this case. *See, e.g., Kirby v. Cullinet Software, Inc.*, 116  
 7 F.R.D. 303, 308 (D. Mass. 1987) (investment strategy is “of little importance to . . .  
 8 suitability as a class representative”); *In re Qwest Commc’ns Int’l, Inc. Sec. Litig.*,  
 9 2005 U.S. Dist. LEXIS 11618, at \*15 (D. Colo. June 7, 2005) (finding auditor failed  
 10 to show why information relating to trading activities, strategies and sophistication of  
 11 plaintiff is necessary to trial of issues affecting the class).

12 KPMG also claims that the discovery is relevant to NYSTRS’s sophistication.  
 13 NYSTRS’s sophistication is not at all relevant to any merits issue or class certification  
 14 issue in this case. In fact, courts in securities fraud class actions routinely reject  
 15 attempts to defeat class certification or class representation based on “sophistication”  
 16 arguments. For example, in *In re Assisted Living Concepts, Inc. Sec. Litig.*, 2001 U.S.  
 17 Dist. LEXIS 12864 (D. Or. April 13, 2001), the court denied KPMG’s motion to  
 18 compel production of similar documents relating to plaintiff’s personal investment  
 19 experience, history, objectives and strategies. The court found that the requests were  
 20 overbroad, far-reaching and burdensome. Moreover, the court found the burden and  
 21 expense of the discovery outweighed any possible relevance where, as here, the  
 22 plaintiff produced its trading records in the securities at issue in the case. *Id.*; *see also*  
 23 *Malanka v. Data General Corp.*, 1986 WL 541, at \*2 (D. Mass. July 2, 1986)  
 24 (rejecting broad discovery where plaintiff produced records “specifically related to the  
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26 <sup>8</sup> The “Complaint” refers to the Second Amended Consolidated Class Action  
 27 Complaint dated April 30, 2008, the operative complaint in this case.

1 case *sub judice*” because “production of these documents is sufficient to satisfy the  
2 concerns of the typicality requirement”). As in the *Assisted Living Concepts* case,  
3 KPMG cannot make a particularized showing of relevance for documents concerning  
4 NYSTRS’s overall investment strategies and practices.

5 Similarly, in *In re Motel 6 Sec. Litig.*, 1996 WL 474175 (S.D.N.Y. Aug. 21,  
6 1996), the court found that trading records showing plaintiffs’ class period  
7 transactions in the subject securities were sufficient for defendant’s purported need to  
8 analyze the plaintiffs’ trading patterns. The court rejected defendant’s arguments – as  
9 here – that detailed discovery of a plaintiffs’ trading history, policies and practices is  
10 relevant to “demonstrate plaintiffs’ sophistication or to obtain clues to their trading  
11 strategies.” *Id.* at \*1. The court reasoned that “Plaintiffs have provided defendant an  
12 apparently complete list of their trades in [Motel 6] shares, and those documents,  
13 either alone or supplemented by depositions of the responsible traders, can be utilized  
14 for an investment expert’s analysis of trading patterns and strategies. No further relief  
15 is warranted on this score.” *Id.* at \*1. The court further found that the request for  
16 trading records in other securities “promises to be both extremely burdensome and of  
17 only marginal value in assessing what trading strategy they utilized in connection with  
18 their purchase and sale of Motel 6 shares.” *Id.*

19 Here, NYSTRS has produced its trading records in New Century stock, as well  
20 as its annual financial reports, its reports of equity holdings, and its investment policy  
21 manuals, which are more than sufficient for KPMG’s purported need to assess  
22 NYSTRS’s sophistication and trading strategies.

23 Additionally, many courts find that a broad inquiry into plaintiffs’ trading and  
24 investment strategies in other securities is not properly the subject of discovery in a  
25 securities fraud class action because it does not relate to any merits or class  
26 certification issues. *See, e.g., Epstein v. MCA, Inc.*, 54 F.3d 1422, 1423 (9th Cir.  
27 1995) (holding that plaintiffs in a securities class action were not required to provide  
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information regarding investment history because “[a]ny information [defendant] may have gleaned from these discovery request would have no bearing on either the merits of the case” or on class certification); *In re AST Research Sec. Litig.*, 1994 U.S. Dist. LEXIS 20850, at \*9-10 (C.D. Cal. Nov. 8, 1994) (rejecting defendants’ argument that lead plaintiff was not an adequate class representative because it refused to produce discovery concerning transactions in other securities and noting plaintiffs’ position was “reasonable”); *Lawrence E. Jaffe Pension Plan v. Household Intern’l, Inc.*, 2005 WL 3801463, at \*3-5 (N.D. Ill. Apr. 18, 2005) (investment history not relevant to rebut fraud on the market or liability on a class-wide basis); *Lemanik, S.A. v. McKinley Allsopp, Inc.*, 125 F.R.D. 602, 609-10 (S.D.N.Y. 1989) (discovery regarding prior securities transaction denied where no nexus with the investments at issue in this action); *Burstein v. Applied Extrusion Techs., Inc.*, 153 F.R.D. 488 (D. Mass. 1984) (denying motion to compel broad discovery of plaintiffs’ trading records without sufficient showing that documents would rebut the “fraud on the market” presumption). The discovery is not relevant because courts routinely find that class certification or representation cannot be defeated based on a lead plaintiff’s trading history or investment philosophy. *See, e.g., Teichler v. DSC Comm’ns Corp.*, 1988 U.S. Dist. LEXIS 16448, at \*17 (N.D. Tex. Apr. 15, 1988) (rejecting argument “that [the proposed class representative’s] stock trading history is atypical” which renders him inadequate “because this Court has found no authority to support it”); *see also J/H Real Estate, Inc. v. Abramson*, 1996 U.S. Dist. LEXIS 1546 (E.D. Pa. Feb. 9, 1996) (investment company plaintiff’s investment activities do not bar class certification); *In re Novacare Sec. Litig.*, 1995 U.S. Dist. LEXIS 15049, at \*10 (E.D. Pa. Oct. 13, 1995) (institutional investors with “complex trading strategies and hedging techniques” approved as class representatives); *Hoexter v. Simmons*, 140 F.R.D. 416, 420 (D. Ariz. 1991) (institutional investors and arbitrageurs approved as class representatives); *Fry v. UAL Corp.*, 136 F.R.D. 626, 634 (N.D. Ill. 1991) (option



trading activities do not bar class representation); *Wells v. HBO & Co.*, 1991 WL 131177, at \*4 (N.D. Ga. Apr. 24, 1991) (“the fact that a plaintiff’s investment strategy differs . . . is not enough to render the claims of the representative atypical”); *Tolan v. Computervision Corp.*, 696 F. Supp. 779, 780 (D. Mass. 1988) (“[I]t is of no consequence that the putative plaintiffs devised different investment strategies”).

Although KPMG cites to a handful of cases where courts have permitted discovery into a lead plaintiff’s trading history, they are out-of-district cases where discovery was allowed under limited circumstances unique to those cases. For example, in *In re Acceptance Ins. Cos. Sec. Litig.*, 2002 U.S. Dist. LEXIS 27681 (D. Neb. Aug. 2, 2002) cited by KPMG, the court permitted discovery of trading history where the lead plaintiffs were individual trusts and not institutional investors and discovery was limited to a relevant time period. *Id.* at \*13. Similarly, in *In re Grand Casinos, Inc. Sec. Litig.*, 181 F.R.D. 615 (D. Minn. 1998), also cited by KPMG, the court permitted discovery into the trading history and strategy limited to **certain** of the lead plaintiffs where defendants provided “ample support” that “one or more of the Lead Plaintiffs traded in [defendants’] securities, while knowing that the alleged misrepresentations were false, in order to advance personal purposes which were unrelated to any claimed deception on Defendants’ part.” *Id.* at 620, n4. Finally, in *In re Harcourt Brace Jovanovich Inc., Sec. Litig.*, 838 F. Supp. 109 (S.D.N.Y. 1993), the court affirmed a magistrate judge’s order compelling discovery of the trading history for certain of the lead plaintiffs – two individual investors – where plaintiffs alleged both **direct** reliance and indirect reliance. *Id.* at 112-14. *In re ML-Lee Acquisition Fund II, L.P.*, 149 F.R.D. 506 (D. Del. 1993), a pre-PSLRA case cited by KPMG, concerned discovery to determine whether the lead plaintiff should be disqualified as a “professional plaintiff.” *Id.* at 508; *see also Goldman v. Alhadeff*, 1990 U.S. Dist. LEXIS 11808, at \*4-6 (W.D. Wash. Jan. 31, 1990) (pre-PSLRA decision permitting

sophistication discovery of individual lead plaintiffs). None of the unique circumstances in KMPG's cited authorities is applicable here.

Even if NYSTRS's trading in other securities could somehow shed light on its investment policies as they relate to its New Century investment, which it cannot, such marginal relevance must be balanced against the privacy invasion and substantial burden on NYSTRS, which invested in *hundreds* of other publicly traded companies during the relevant time period. Indeed, "private financial records are normally entitled to privacy protections." *Charles O. Bradley Trust v. Zenith Capital LLC*, No. C-04-2239 JSW (EMC), 2006 WL 798991, at \*2 (N.D. Cal. Mar. 24, 2006).

Moreover, "prior securities transactions are relevant only to the extent that there is an adequate nexus with investments at issue in [the] action." *Sussman v. Paradigm Partners, Inc.*, 1993 WL 385752, at \*1 (S.D.N.Y. Sept. 22, 1993), quoting *Lemanik, S.A. v. McKinley Allsopp, Inc.*, 125 F.R.D. 602, 609-10 (S.D.N.Y. 1989). Requiring NYSTRS, which oversees assets of approximately \$72 billion, to search for and produce records regarding its investments through the "Leeway Clause" and all documents concerning the Investment Advisory Committee, Real Estate Advisory Committee, and REIT Real Estate Advisors that refer or relate to NYSTRS's investment in mortgage-related investment vehicles or REITS – all of which have nothing to do with New Century or this litigation (*see* NYSTRS Declaration, at ¶¶8, 12-19) – is contrary to the very purpose of the PSLRA to encourage institutional investors (like NYSTRS) to take the lead in vindicating and recovering on behalf of shareholders in securities fraud class actions.

Indeed, commentators have recognized that, in securities fraud cases, "[d]iscovery from class members . . . is susceptible to being used by parties . . . as a device to harass and embarrass." Manual for Complex Litigation, Third, 30.12, at 216 (1995); *see also* Elliott J. Weiss & John S. Beckerman, *Let the Money Do The Monitoring: How Institutional Investors Can Reduce Agency Costs In Securities Class*

1 *Actions*, 104 Yale L.J. 2053 (1995). Here, the Court should protect NYSTRS, an  
 2 institutional investor that answered Congress' call to serve as Lead Plaintiff, and  
 3 prevent KPMPG from harassing it with burdensome, irrelevant discovery.

4 KPMG's discovery, if permitted, would cause substantial burden to NYSTRS,  
 5 which would be forced to search for and produce thousands of pages of documents  
 6 concerning its investments in real estate and real estate-and mortgage-related  
 7 investment vehicles that are unrelated to its investment in New Century stock. *See*  
 8 NYSTRS Declaration ¶¶12, 20. Furthermore, detailed information about NYSTRS's  
 9 investment objectives and philosophies can be found in NYSTRS's comprehensive  
 10 annual financial reports and NYSTRS's investment policy manuals, which have  
 11 already been produced to KPMG. *See* NYSTRS Declaration, at ¶22. KPMG fails to  
 12 explain the relevance of the additional details it seeks. Given its complete lack of  
 13 relevance to any issue in this case, NYSTRS should not be put to the burden of  
 14 production. This is especially true given NYSTRS's express representation that its  
 15 investments in New Century stock were not made as a "mortgage-related" investment  
 16 or REIT; made through the Leeway Clause; or involved its Investment Advisory  
 17 Committee, its Real Estate Advisory Committee, or its REIT Real Estate Advisors.  
 18 *See* NYSTRS Declaration, ¶¶12-19. The production of voluminous and burdensome  
 19 documents that have nothing to do with this case or NYSTRS's investments in New  
 20 Century stock is beyond the scope of appropriate discovery.

21 **2. Documents Withheld by Plaintiffs On Work Product Grounds**  
 22 **REQUEST FOR PRODUCTION NO. 50**

23 All DOCUMENTS, including but not limited to, COMMUNICATIONS, from  
 24 January 1, 2005 to the present that support YOUR claims and/or defenses in this  
 25 ACTION.

26 **RESPONSE TO REQUEST NO. 50**

1 Plaintiffs incorporate their General Objections and Objections to Definitions by  
2 reference. Plaintiffs object to this Request as overbroad, unduly burdensome, and not  
3 reasonably calculated to lead to the discovery of admissible evidence. Plaintiffs  
4 object to this Request to the extent it calls for documents not within Plaintiffs'  
5 possession, custody or control or to which KPMG has equal or superior access.  
6 Plaintiffs object to the Request to the extent it seeks production of documents  
7 protected from disclosure by the attorney-client privilege, work product doctrine, or  
8 any other applicable privilege or protection.

9 Subject to and without waiving any of the general and specific objections, Lead  
10 Plaintiff NYSTRS will produce relevant non-privileged responsive documents, if any,  
11 in their possession, custody or control from May 5, 2005 to March 13, 2007  
12 responsive to this Request.

13 **JUNE 11 MODIFIED RESPONSE TO REQUEST NO. 50**

14 As discussed in the June 5, 2009 meet and confer, to the extent that NYSTRS  
15 has any non-privileged documents in its files, including communications, from  
16 January 1, 2005 to the present that support its claims and/or defenses in this action,  
17 including publicly available documents, they will be produced. To the extent that  
18 NYSTRS' counsel has documents as a result of its investigation that are publicly  
19 available, such as the Examiner's report, SEC filings, and press releases, they will not  
20 be produced, as they are equally accessible to KPMG and constitute privileged work-  
21 product. To the extent that NYSTRS' counsel received New Century documents from  
22 former New Century employees, they will be produced.

23 **REQUEST FOR PRODUCTION NO. 51**

24 All DOCUMENTS, including but not limited to, COMMUNICATIONS, that  
25 refer or relate to YOUR contention in paragraph 538 of the COMPLAINT that,  
26 "KPMG's material misstatements in its publicly-issued 2005 audit opinions and  
27 KPMG's extensive role in the accounting misstatements and internal control  
28

1 weaknesses that were disclosed, beginning on February 7, 2007 through the end of the  
 2 Class Period, further demonstrate both the artificial inflation KPMG's conduct caused  
 3 in the price of New Century securities and that KPMG's conduct proximately caused  
 4 foreseeable losses and damages to Plaintiffs and members of the Class."

5 **RESPONSE TO REQUEST NO. 51**

6 Plaintiffs incorporate their General Objections and Objections to Definitions by  
 7 reference. Plaintiffs object to this Request as overbroad, unduly burdensome, and not  
 8 reasonably calculated to lead to the discovery of admissible evidence. Plaintiffs  
 9 object to this Request as improper contention discovery which is premature at this  
 10 stage of the litigation to the extent that it calls for the disclosure of documents  
 11 concerning Plaintiffs' factual and legal contentions in this action, when discovery is  
 12 ongoing and the record has yet to be fully developed. Plaintiffs object to this Request  
 13 to the extent it seeks documents protected from disclosure by the attorney-client  
 14 privilege, work product doctrine, or any other applicable privilege or protection.

15 **JUNE 11 MODIFIED RESPONSE TO REQUEST NO. 51**

16 As discussed in the June 5, 2009 meet and confer, to the extent that NYSTRS  
 17 has any non-privileged documents in its files, including publicly available documents,  
 18 relating to the contention in paragraph 538 of the Complaint, they will be produced.  
 19 To the extent that NYSTRS' counsel has documents as a result of its investigation that  
 20 are publicly available relating to paragraph 538 of the Complaint, they will not be  
 21 produced, as they are equally accessible to KPMG and constitute privileged work-  
 22 product. To the extent that NYSTRS' counsel received New Century documents from  
 23 former New Century employees, they will be produced.

24 **REQUEST FOR PRODUCTION NO. 52**

25 All DOCUMENTS, including but not limited to, COMMUNICATIONS, that  
 26 refer or relate to YOUR contention in paragraph 539 of the COMPLAINT that, "[t]he  
 27 disclosures beginning on February 7, 2007 specifically concerned accounting and  
 28

1 internal control issues with which KPMG was extensively involved in its 2005 audits  
 2 and areas in which KPMG specifically violated GAAS and the standards of the  
 3 PCAOB in connection with its 2005 audits, including the repurchase reserves backlog  
 4 and related internal control weaknesses and the required adjustments to Residual  
 5 Interests as set forth above.”

6 **RESPONSE TO REQUEST NO. 52**

7 Plaintiffs incorporate their General Objections and Objections to Definitions by  
 8 reference. Plaintiffs object to this Request as overbroad, unduly burdensome and not  
 9 reasonably calculated to lead to the discovery of admissible evidence. Plaintiffs  
 10 object to this Request as improper contention discovery which is premature at this  
 11 stage of the litigation to the extent that it calls for the disclosure of documents  
 12 concerning Plaintiffs’ factual and legal contentions in this action, when discovery is  
 13 ongoing and the record has yet to be fully developed. Plaintiffs object to this Request  
 14 to the extent it seeks documents protected from disclosure by the attorney-client  
 15 privilege, work product doctrine, or any other applicable privilege or protection.

16 **JUNE 11 MODIFIED RESPONSE TO REQUEST NO. 52**

17 As discussed in the June 5, 2009 meet and confer, to the extent that NYSTRS  
 18 has any non-privileged documents in its files, including publicly available documents,  
 19 relating to the contention in paragraph 539 of the Complaint, they will be produced.  
 20 To the extent that NYSTRS’ counsel has documents as a result of its investigation that  
 21 are publicly available relating to paragraph 539 of the Complaint, they will not be  
 22 produced, as they are equally accessible to KPMG and constitute privileged work-  
 23 product. To the extent that NYSTRS’ counsel received New Century documents from  
 24 former New Century employees, they will be produced.

25 **REQUEST FOR PRODUCTION NO. 53**

26 All DOCUMENTS, including but not limited to, COMMUNICATIONS, that  
 27 refer or relate to YOUR contention in paragraph 540 of the COMPLAINT that  
 28



1 “[t]hereafter, the price of New Century securities continued to decline on March 2,  
2 2007, when additional disclosures were made, including, specifically, issues  
3 pertaining to the Company’s valuation of Residual Interests in 2006 ‘and prior  
4 periods.’ As alleged in this Second Amended Complaint, KPMG’s 2005 audits  
5 specifically violated GAAS and the standards of the PCAOB in connection with this  
6 audit of New Century’s Residual Interests and related internal controls and, as  
7 reported by the Examiner (at 329) and set forth in paragraph 480 above, KPMG’s  
8 February 2007 report to the Special Investigation Committee of the Audit Committee  
9 (the ‘SIC’) was ‘[t]he primary reason the SIC looked more closely at New Century’s  
10 accounting for residual interests...in February 2007.’”

11 **RESPONSE TO REQUEST NO. 53**

12 Plaintiffs incorporate their General Objections and Objections to Definitions by  
13 reference. Plaintiffs object to this Request as overbroad, unduly burdensome, and not  
14 reasonably calculated to lead to the discovery of admissible evidence. Plaintiffs  
15 object to this Request as improper contention discovery which is premature at this  
16 stage of the litigation to the extent that it calls for the disclosure of documents  
17 concerning Plaintiffs’ factual and legal contentions in this action, when discovery is  
18 ongoing and the record has yet to be fully developed. Plaintiffs object to this Request  
19 to the extent it seeks documents protected from disclosure by the attorney-client  
20 privilege, work product doctrine, or any other applicable privilege or protection.

21 **JUNE 11 MODIFIED RESPONSE TO REQUEST NO. 53**

22 As discussed in the June 5, 2009 meet and confer, to the extent that NYSTRS  
23 has any non-privileged documents in its files, including publicly available documents,  
24 relating to the contention in paragraph 540 of the Complaint, they will be produced.  
25 To the extent that NYSTRS’ counsel has documents as a result of its investigation that  
26 are publicly available relating to paragraph 540 of the Complaint, they will not be  
27 produced, as they are equally accessible to KPMG and constitute privileged work-



1 product. To the extent that NYSTRS' counsel received New Century documents from  
2 former New Century employees, they will be produced.

3 **REQUEST FOR PRODUCTION NO. 54**

4 All DOCUMENTS, including but not limited to, COMMUNICATIONS, that  
5 refer or relate to YOUR contention in paragraph 49 of the COMPLAINT that "[t]he  
6 members of the class are so numerous that joinder of all members is impracticable."

7 **RESPONSE TO REQUEST NO. 54**

8 Plaintiffs incorporate their General Objections and Objections to Definitions by  
9 reference. Plaintiffs object to this Request as overbroad, unduly burdensome, and not  
10 reasonably calculated to lead to the discovery of admissible evidence. Plaintiffs  
11 object to this Request as improper contention discovery which is premature at this  
12 stage of the litigation to the extent that it calls for the disclosure of documents  
13 concerning Plaintiffs' factual and legal contentions in this action, when discovery is  
14 ongoing and the record has yet to be fully developed. Plaintiffs object to this Request  
15 to the extent it seeks documents protected from disclosure by the attorney-client  
16 privilege, work product doctrine, or any other applicable privilege or protection.

17 **JUNE 11 MODIFIED RESPONSE TO REQUEST NO. 54**

18 As discussed in the June 5, 2009 meet and confer, to the extent that NYSTRS  
19 has any non-privileged documents in its files, including publicly available documents,  
20 relating to the contention in paragraph 49 of the Complaint, they will be produced. To  
21 the extent that NYSTRS' counsel has documents as a result of its investigation that  
22 are publicly available relating to paragraph 49 of the Complaint, they will not be  
23 produced, as they are equally accessible to KPMG and constitute privileged work-  
24 product. To the extent that NYSTRS' counsel received New Century documents from  
25 former New Century employees, they will be produced.

**REQUEST FOR PRODUCTION NO. 55**

All DOCUMENTS, including but not limited to, COMMUNICATIONS, that refer or relate to YOUR contention in paragraph 50 of the COMPLAINT that “Plaintiffs’ claims are typical of the claims of the members of the Class.”

**RESPONSE TO REQUEST NO. 55**

Plaintiffs incorporate their General Objections and Objections to Definitions by reference. Plaintiffs object to this Request as overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Plaintiffs object to this Request as improper contention discovery which is premature at this stage of the litigation to the extent that it calls for the disclosure of documents concerning Plaintiffs’ factual and legal contentions in this action, when discovery is ongoing and the record has yet to be fully developed. Plaintiffs object to this Request to the extent it seeks documents protected from disclosure by the attorney-client privilege, work product doctrine, or any other applicable privilege or protection.

**JUNE 11 MODIFIED RESPONSE TO REQUEST NO. 55**

As discussed in the June 5, 2009 meet and confer, to the extent that NYSTRS has any non-privileged documents in its files, including publicly available documents, relating to the contention in paragraph 50 of the Complaint, they will be produced. To the extent that NYSTRS’ counsel has documents as a result of its investigation that are publicly available relating to paragraph 50 of the Complaint, they will not be produced, as they are equally accessible to KPMG and constitute privileged work-product. To the extent that NYSTRS’ counsel received New Century documents from former New Century employees, they will be produced.

**REQUEST FOR PRODUCTION NO. 56**

All DOCUMENTS, including but not limited to, COMMUNICATIONS, that refer or relate to YOUR contention in paragraph 51 of the COMPLAINT that “Plaintiffs’ will fairly and adequately represent the interests of the members of the

1 Class and have retained counsel competent and experienced in class and securities  
2 litigation.”

3 **RESPONSE TO REQUEST NO. 56**

4 Plaintiffs incorporate their General Objections and Objections to Definitions by  
5 reference. Plaintiffs object to this Request as overbroad, unduly burdensome, and not  
6 reasonably calculated to lead to the discovery of admissible evidence. Plaintiffs  
7 object to this Request as improper contention discovery which is premature at this  
8 stage of the litigation to the extent that it calls for the disclosure of documents  
9 concerning Plaintiffs’ factual and legal contentions in this action, when discovery is  
10 ongoing and the record has yet to be fully developed. Plaintiffs object to this Request  
11 to the extent it seeks documents protected from disclosure by the attorney-client  
12 privilege, work product doctrine, or any other applicable privilege or protection.

13 **JUNE 11 MODIFIED RESPONSE TO REQUEST NO. 56**

14 As discussed in the June 5, 2009 meet and confer, to the extent that NYSTRS  
15 has any non-privileged documents in its files, including publicly available documents,  
16 relating to the contention in paragraph 51 of the Complaint, they will be produced. To  
17 the extent that NYSTRS’ counsel has documents as a result of its investigation that  
18 are publicly available relating to paragraph 51 of the Complaint, they will not be  
19 produced, as they are equally accessible to KPMG and constitute privileged work-  
20 product. To the extent that NYSTRS’ counsel received New Century documents from  
21 former New Century employees, they will be produced.

22 **REQUEST FOR PRODUCTION NO. 57**

23 All DOCUMENTS, including but not limited to, COMMUNICATIONS, that  
24 refer or relate to YOUR contention in paragraph 53 of the COMPLAINT that  
25 “[c]ommon questions of law and fact exist as to all members of the Class, and  
26 predominate over any questions affecting solely individual members of the Class.”

27 **RESPONSE TO REQUEST NO. 57**

1 Plaintiffs incorporate their General Objections and Objections to Definitions by  
 2 reference. Plaintiffs object to this Request as overbroad, unduly burdensome, and not  
 3 reasonably calculated to lead to the discovery of admissible evidence. Plaintiffs  
 4 object to this Request as improper contention discovery which is premature at this  
 5 stage of the litigation to the extent that it calls for the disclosure of documents  
 6 concerning Plaintiffs' factual and legal contentions in this action, when discovery is  
 7 ongoing and the record has yet to be fully developed. Plaintiffs object to this Request  
 8 to the extent it seeks documents protected from disclosure by the attorney-client  
 9 privilege, work product doctrine, or any other applicable privilege or protection.

#### 10 **JUNE 11 MODIFIED RESPONSE TO REQUEST NO. 57**

11 As discussed in the June 5, 2009 meet and confer, to the extent that NYSTRS  
 12 has any non-privileged documents in its files, including publicly available documents,  
 13 relating to the contention in paragraph 53 of the Complaint, they will be produced. To  
 14 the extent that NYSTRS' counsel has documents as a result of its investigation that  
 15 are publicly available relating to paragraph 53 of the Complaint, they will not be  
 16 produced, as they are equally accessible to KPMG and constitute privileged work-  
 17 product. To the extent that NYSTRS' counsel received New Century documents from  
 18 former New Century employees, they will be produced.

#### 19 **A. KPMG'S POSITION**

##### 20 **1. The Work Product Doctrine Does Not Apply to Documents Collected** 21 **By Lead Plaintiff During Its Investigation**

22 The parties' dispute regarding Requests Nos. 50-57 relate to Plaintiffs' assertion  
 23 that the work product doctrine protects *documents* that their counsel collected during  
 24 the course of their investigation. Plaintiffs' assertion is improper and contrary to the  
 25 law.

26 During the meet and confer process, Plaintiffs initially asserted that documents  
 27 responsive to Request Nos. 50-57 that were collected during their counsels'

1 investigation are protected work product and would not be produced. During the  
 2 parties' July 23-24 conference, however, Plaintiffs changed their position and stated  
 3 that it would produce—both from the files of NYSTRS and its counsel—all  
 4 documents responsive to these Requests except for publicly available documents that  
 5 it collected during its investigation. *See* Lopez Decl. ¶ 12; Exh. G, at 147. But  
 6 Plaintiffs then changed their position again, stating that it would only produce non-  
 7 public documents *that were referred to in the Complaint*. *See* Lopez Decl., Exh. H, at  
 8 158; Exh. J, at 168. That offer to produce documents referred to in the Complaint,  
 9 however, unreasonably limits the scope of documents responsive to Request Nos. 50-  
 10 57,<sup>9</sup> and is an improper assertion of the work product doctrine.

11 Work product protection does not extend to documents “located and assembled  
 12 in the course of factual investigations.” *Layman v. Combs*, 1988 U.S. Dist. LEXIS  
 13 18517, at \*6 (N.D. Cal. Feb. 22, 1988), *overruled on other grounds* 994 F.2d 1344  
 14 (9th Cir. 1992). To the contrary, “[a] party may compel production of whatever  
 15 documents or other evidence the opposing party (or counsel) has collected or  
 16 assembled relating to a particular issue. There is no work product protection because  
 17 the collection or assembly of documents, as opposed to their creation, does not  
 18 necessarily reveal counsel’s mental impressions and litigation strategy.” William W.  
 19 Schwarzer et al., *Federal Civil Procedure Before Trial* 11:846 (Rutter Group 2009);  
 20 *see Kartman v. State Farm Mut. Auto. Ins. Co.*, 247 F.R.D. 561, 564 (D. Ind. Dec. 21,  
 21 2007) (“Merely gathering documents from third parties does not gloss the documents  
 22 with an attorney’s mental impressions any more tha[n] simply sharing documents with  
 23 an attorney stamps the documents with the imprimatur of attorney-client privilege.”).

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24  
 25  
 26 <sup>9</sup> Plaintiffs’ agreement to produce documents referred to in the Complaint is  
 27 responsive to Request No. 59, which is not in dispute here.

For example, in *Zucker v. Sable*, 72 F.R.D. 1 (S.D.N.Y. 1975), the plaintiff refused to produce requested documents, claiming, as Plaintiffs do here, that they had been located and collected in preparing for litigation. The documents included press releases, newspaper articles, advertisements, and similar pre-existing materials prepared for non-litigation purposes. The court held that the work product doctrine is limited to items which involve an attorney's professional skill and experience, and therefore that the "documents in question, which were not originated by counsel in preparation of his case, are not immune from discovery." *Id.* at 3.

Accordingly, the Court should reject Plaintiffs' work-product assertion, and compel the production of documents that Plaintiffs' counsel collected in the course of their investigation, as well as documents Plaintiffs referred to in their Complaint. *See In re Convergent Tech. Sec. Litig.*, 108 F.R.D. 328, 341 (N.D. Cal. 1985) (plaintiffs compelled to produce all documents that support or contradict any of the allegations in complaint).

#### **B. PLAINTIFFS' POSITION**

KPMG Request Nos. 50-57 seeks the production of all documents relating to or supporting allegations in the Complaint, including documents from the investigative files of Plaintiffs' Lead Counsel to the present. During the meet and confer with KPMG regarding these Requests, Plaintiffs agreed to produce *all* public and nonpublic documents in Plaintiffs' (as opposed to Plaintiffs' Lead Counsel's) files responsive to these Requests. And Plaintiffs even agreed to produce *all* documents received from confidential witnesses, even from Plaintiffs' Lead Counsel's files. *Id.* Contrary to KPMG's mischaracterization of the conference on July 23-24, Plaintiffs' Lead Counsel did not represent that it would produce all documents, other than publicly available documents, that were collected by Plaintiffs' Lead Counsel in the course of its investigation. Instead, during that conference, Plaintiffs' Lead Counsel stated that documents Plaintiffs' Lead Counsel gathered in preparation of the



1 Complaint would not be produced; however, Plaintiffs' Lead Counsel would produce  
 2 documents obtained from confidential witnesses in the course of investigating the  
 3 Complaint. *See* Lin Decl., at ¶10, Ex. B. Plaintiffs' Lead Counsel also stated that if  
 4 any responsive documents were contained in Plaintiffs' files (as opposed to Plaintiffs'  
 5 Lead Counsel's files), they would be produced. *See* Lin Decl., at ¶10, Ex. B. Thus,  
 6 this dispute boils down to KPMG's request that Plaintiffs produce all documents  
 7 collected and reviewed by Plaintiffs' Lead Counsel as part of its investigation of this  
 8 matter – irrespective of whether such documents are referenced in the Complaint or  
 9 not.

10 By way of background, pursuant to the Private Securities Litigation Reform Act  
 11 applicable to this case, 15 U.S.C. § 78u-4(b)(3)(B), discovery could not commence  
 12 until after the Complaint withstood Defendants' motions to dismiss. Accordingly, the  
 13 Complaint's allegations were based on readily and publicly available information such  
 14 as New Century's SEC filings, press releases, news reports, and the Examiner's  
 15 Report.<sup>10</sup> The Complaint also included allegations based on data compiled by  
 16 Plaintiffs' Lead Counsel concerning New Century's residential mortgage loans that  
 17 New Century reported pursuant to the Home Mortgage Disclosure Act of 1972  
 18 ("HMDA"), which are publicly available on the Internet.

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21 <sup>10</sup> The first paragraph of the Complaint expressly stated: "Lead Plaintiff, the New  
 22 York State Teachers' Retirement System, and Plaintiffs Carl Larson and Charles  
 23 Hooten (collectively, "Plaintiffs") make the following allegations upon information  
 24 and belief based upon all of the facts set forth herein which were obtained through an  
 25 investigation made by and through Plaintiffs' Lead Counsel. Lead Counsel's  
 26 investigation has included, among other things, a review of filings by Defendants with  
 27 the United States Securities and Exchange Commission ("SEC"), press releases and  
 28 other public statements issued by Defendants, the Final Report of Michael J. Missal,  
 Bankruptcy Court Examiner (the "Examiner"), dated February 29, 2008 (the  
 "Examiner's Report"), and the other sources set forth below."



1 In conferences with Plaintiffs' Lead Counsel and in its August 19, 2009 letter,  
 2 KPMG appeared to agree that publicly available documents collected by Plaintiffs'  
 3 Lead Counsel did not need to be produced. *See* Ex. I, attached to Lopez Decl. Even if  
 4 KPMG has now changed its position and seeks the production of the publicly  
 5 available documents collected by Plaintiffs' Lead Counsel, the Court should not  
 6 require the production of these publicly available documents because the production  
 7 of documents from Plaintiffs' Lead Counsel's investigative files would provide a  
 8 window into Plaintiffs' Lead Counsel's mental process and strategy in this litigation  
 9 by reflecting its search for information and selection of certain documents for  
 10 inclusion in the Complaint. *See Hickman v. Taylor*, 329 U.S. 495, 510 (1947) ("not  
 11 even the most liberal discovery theories can justify unwarranted inquiries into the files  
 12 and the mental impressions of an attorney."). "Where the selection, organization, and  
 13 characterization of facts reveal the theories, opinions, or mental impressions of a party  
 14 or the party's representative, that material qualifies as opinion work product."  
 15 *Kintera, Inc. v. Convio, Inc.*, 219 F.R.D. 503, 507 (S.D. Cal. 2003). "Opinion work  
 16 product receives 'nearly absolute protection.'" *Id.*<sup>11</sup>

17  
 18 <sup>11</sup> "Discovery was hardly intended to enable a learned profession to perform its  
 19 functions . . . on wits borrowed from the adversary." *Hickman v. Taylor*, 329 U.S.  
 20 495, 516 (1947). The work-product doctrine codified in Federal Rule of Civil  
 21 Procedure 26(b)(3) protects from discovery "documents and tangible things prepared  
 22 by a party or his representative in anticipation of litigation." *Admiral Ins. Co. v.*  
 23 *United States District Court for the District of Arizona*, 881 F.2d 1486, 1494 (9th Cir.  
 24 1989). In determining whether a document is protected by the work-product doctrine,  
 25 the Ninth Circuit has adopted the "because of" litigation test, rather than the "primary  
 26 motivation" test." *In re Grand Jury Subpoena (Mark Torf/Torf Environmental*  
 27 *Mgmt.)*, 357 F.3d 900, 907 (9th Cir. 2004). Under any test, the documents that Lead  
 Counsel reviewed and collected in the course of its investigation are protected work  
 product, as they reflect counsel's state of mind and were selected in anticipation and  
 because of this litigation. *See Strougo v. BEA Assocs.*, 199 F.R.D. 515, 520 (S.D.N.Y.  
 2001) (documents should be deemed prepared "in anticipation of litigation" if "in light

(Footnote continued)

Moreover, because these documents are publicly available and equally accessible to KPMG, KPMG can obtain them without intrusion into opposing counsel's files and thought processes.

Aside from the publicly available information, the nonpublicly available documents supporting or relating to the claims and allegations in the Complaint are:

- (i) records of Plaintiffs' transactions (buys and sales) in New Century securities; and
- (ii) documents concerning Plaintiffs' Lead Counsel's communications with, and documents Plaintiffs' Lead Counsel received from, confidential witnesses in the course of investigating the claims and allegations in this case. Plaintiffs' Lead Counsel also received document productions from third parties through formal discovery after the PLSRA's discovery stay was lifted.

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of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared *or obtained* because of the prospect of litigation"); *United States v. KPMG LLP*, 2003 U.S. Dist. LEXIS 18476, at \*4 (D.D.C. Oct. 8, 2003) (same). Disclosure of such documents would reveal Lead Counsel's work product by disclosing, among other things, which documents counsel viewed as important relative to others in preparation of the Complaint.

The authorities cited by KPMG do not hold otherwise. For example, *Layman v. Combs*, 1988 U.S. Dist. LEXIS 18517 (N.D. Cal. Feb. 22, 1988), ordered production of documents obtained from certain third parties by plaintiffs' counsel where plaintiffs failed to serve any written objections to the discovery. Similarly, the court in *Kartman v. State Farm Mut. Auto Ins. Co.*, 247 F.R.D. 561 (S.D. Ind. 2007) recognized that "under certain circumstances providing the documents assembled by counsel could provide a window into counsel's mental process." *Id.* at 564. Such circumstances are present here, where disclosure of all documents collected by Lead Counsel in the course of its investigation would give KPMG unfair insight into counsel's mental impression and litigation strategy. *See, e.g., Sporck v. Peil*, 759 F.2d 312, 315-16 (3d Cir. 1985) (disclosure of documents as a group will reveal counsel's selection process and mental impressions); *James Julian, Inc. v. Raytheon Co.*, 93 F.R.D. 138, 144 (D. Del. 1982) ("In selecting and ordering a few documents out of the thousands counsel could not help but reveal important aspects of his understanding of the case.").

1 Because (i) records of Plaintiffs' transactions in New Century securities were  
 2 agreed to and have been produced to KPMG, (ii) Plaintiffs' Lead Counsel has agreed  
 3 to produce documents it received from confidential witnesses, and (iii) Plaintiffs'  
 4 Lead Counsel has produced to Defendants all documents it received from third parties  
 5 through formal discovery, it appears that KPMG seeks, through its overly broad  
 6 Request Nos. 50-57, documents concerning Plaintiffs' Lead Counsel's  
 7 communications with confidential witnesses. Notably, during the meet and confer  
 8 process with KPMG, KPMG asked Plaintiffs' Lead Counsel for the production of its  
 9 communications with confidential witnesses, which KPMG specifically asked for in  
 10 Request No. 69. Plaintiffs objected on the grounds of work product. Despite  
 11 informing Plaintiffs' Lead Counsel that it was moving to compel Request No. 69 (*see*  
 12 Ex. I, attached to the Lopez Declaration), however, KPMG did not move to compel  
 13 production pursuant to Request 69. Instead, KPMG has either conceded that these  
 14 documents are not discoverable work product, or it surreptitiously seeks obtain these  
 15 documents through Request Nos. 50-57 at issue here.

16 In *Upjohn v. United States*, 499 U.S. 383 (1981), the U.S. Supreme Court held  
 17 that the identity of witnesses interviewed by opposing counsel involve protected  
 18 work-product. *Id.* at 399. *See also, California Practice Guide: Federal Civil*  
 19 *Procedure Before Trial* (The Rutter Group 2008), at 11:877 ("seeking the identity of  
 20 witnesses who have been interviewed by opposing counsel or attempting to obtain the  
 21 attorney's notes of such interviews would involve protected work product"); *Seven*  
 22 *Hanover Assocs., LLC v. Jones Lang LaSalle Americas, Inc.*, 2005 U.S. Dist. LEXIS  
 23 32016 (S.D.N.Y. Dec. 7, 2005) (defendant is not entitled to the identification of who  
 24 among knowledgeable individuals have been interviewed by plaintiff's attorney).  
 25 Plaintiffs' Lead Counsel's communications with confidential witnesses were made in  
 26 anticipation of litigation, were made as part of its investigation, and would necessarily  
 27 reveal the identity of witnesses contacted by Plaintiffs' Lead Counsel in the course of  
 28

its investigation. As such, documents concerning these communications are protected by the work-product doctrine. *See, e.g., In re MTI Tech. Corp. Sec. Litig.*, 2002 U.S. Dist. LEXIS 13015, at \*8 (C.D. Cal. June 14, 2002) (The identity of witnesses interviewed by opposing counsel is protected under the work-product doctrine because “if the identity of the interviewed witnesses is disclosed, opposing counsel can infer which witnesses counsel considers important, revealing mental impressions and trial strategies. Such evaluations, impressions, and strategy are at the heart of the work product rule”); *Tierno v. Rite Aid Corp.*, 2008 WL 270589 (N.D. Cal. July 8, 2008) (identity of witnesses is protected attorney-work product); *In re Ashworth, Inc. Sec. Litig.*, 213 F.R.D. 385, 587-389 (S.D. Cal. 2002) (names of witnesses who provided information supporting the complaint were protected as attorney work-product).

Additionally, disclosure of confidential informant identities or communications is disfavored absent a showing of compelling need on KPMG’s part.<sup>12</sup> As a practical matter, disclosure of their identities could jeopardize, among other things, their current employment or their ability to obtain employment. As commentators have noted: “Informants are especially valuable in private securities litigation . . . [and] [t]he need to shield whistleblowers from retaliation is widely acknowledged.”<sup>13</sup>

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<sup>12</sup> *See, e.g., Novak v. Kasaks*, 216 F.3d 300, 314 (2d Cir. 2000) (disclosure of confidential informants’ identities “could deter informants from providing critical information to investigators in meritorious cases or invite retaliation against them”); *accord. New Jersey Carpenters Pension & Annuity Funds v. Biogen Idec, Inc.*, 537 F.3d 35, 52 (1st Cir. 2008); *Makor Issues & Rights, Ltd. v. Tellabs, Inc.*, 437 F.3d 588, 596 (7th Cir. 2006), *rev’d on other grounds*, 127 S. Ct. 2499 (2007); *California Public Employees’ Ret. Sys. v. Chubb Corp.*, 394 F.3d 126, 147 (3d Cir. 2004); *In re Cabletron Sys., Inc.*, 311 F.3d 11, 30 (1st Cir. 2002); *ABC Arbitrage Plaintiffs Group v. Tchuruk*, 291 F.3d 336, 253-53 (5th Cir. 2002).

<sup>13</sup> “Dialogue on the Current Law and Proposals for Reform on the Use of Information From and the Disclosure of the Identity of Informants,” *Bar Assoc. of the City of New York, Sec. Litig. Comm.* (Aug. 2009), at 3.

1 In addition, Plaintiffs' Lead Counsel's own internal notes and memoranda  
 2 regarding its communications with witnesses would reveal counsel's processes and  
 3 methods for conducting investigations, which are proprietary and confidential and, if  
 4 disclosed, could hamper its ability to conduct future investigations and obtain the  
 5 cooperation of other witnesses. Even counsel for KPMG acknowledged this  
 6 protection, stating during a meet and confer with Plaintiffs' Lead Counsel relating to  
 7 KPMG's Requests that it was not seeking Plaintiffs' Lead Counsel's notes regarding  
 8 confidential witnesses. *See* Lin Declaration, ¶10. Accordingly, this work product  
 9 should be protected from disclosure.<sup>14</sup>

10 **3. Documents Plaintiffs Refuse To Produce On Attorney-Client**  
 11 **Privilege Grounds**

12 **REQUEST FOR PRODUCTION NO. 36**

13 All DOCUMENTS from January 1, 2005 to the present from any current and/or  
 14 former NEW shareholder concerning NEW.

15 **RESPONSE TO REQUEST NO. 36**

16 Plaintiffs incorporate their General Objections and Objections to Definitions by  
 17 reference. Plaintiffs object to this Request as overbroad, unduly burdensome, and not  
 18 reasonably calculated to lead to the discovery of admissible evidence. Plaintiffs  
 19 object to this Request as burdensome to the extent it calls for documents not within  
 20 Plaintiffs' possession, custody or control. Plaintiffs also object to this Request as  
 21 vague, incomprehensible and overly burdensome to the extent it requires Plaintiffs to  
 22 ascertain NEW shareholders. Plaintiffs further object to this Request on the grounds  
 23 that it seeks documents protected from discovery by the attorney work product  
 24 doctrine and/or attorney-client privilege.

25 \_\_\_\_\_  
 26 <sup>14</sup> This does not mean that KPMG cannot discover the identity of relevant witnesses  
 27 in this case. All relevant witnesses known to Lead Plaintiff were identified in  
 28 Plaintiffs' initial disclosures provided to KPMG on February 25, 2009.

1 Subject to and without waiving any of the general and specific objections,  
2 Plaintiffs will produce relevant non-privileged documents, if any, in their possession,  
3 custody or control from May 5, 2005 to March 14, 2007 responsive to this Request.

4 **JUNE 11 MODIFIED RESPONSE TO REQUEST NO. 36**

5 NYSTRS is presently not aware of any documents in its files from January 1,  
6 2005 to the present from any current and/or former New shareholder concerning New.  
7 Documents NYSTRS' counsel received from any current and/or former New  
8 shareholder concerning New is [sic] protected by the attorney-client privilege and will  
9 not be produced.

10 **REQUEST FOR PRODUCTION NO. 38**

11 All DOCUMENTS from January 1, 2005 to the present created by or received  
12 from, either directly or indirectly, any other Plaintiff and/or putative class member in  
13 this ACTION.

14 **RESPONSE TO REQUEST NO. 38**

15 Plaintiffs incorporate their General Objections and Objections to Definitions by  
16 reference. Plaintiffs object to this Request as overbroad, unduly burdensome, and not  
17 reasonably calculated to lead to the discovery of admissible evidence. Plaintiffs  
18 object to this Request as vague, incomprehensible and overly burdensome to the  
19 extent it requires Plaintiffs to ascertain putative class members in this Action.  
20 Plaintiffs further object to this Request on the grounds that it seeks documents  
21 protected from discovery by the attorney work product doctrine and/or attorney-client  
22 privilege.

23 **JUNE 11 MODIFIED RESPONSE TO REQUEST NO. 38**

24 As clarified in the June 5, 2009 meet and confer, this Request seeks documents  
25 between NYSTRS and those persons or entities that NYSTRS is aware are Plaintiffs  
26 and/or putative class members in this action and relate to this case. NYSTRS is  
27 presently not aware of any non-privileged documents in its files responsive to this



Request. All communications from January 1, 2005 to the present between or among NYSTRS' counsel and any other Plaintiff and/or putative class member in this Action that refer or relate to New or to this Action are subject to the attorney-client privilege and will not be produced.

**A. KPMG'S POSITION**

Plaintiffs contend that all documents they received from any current or former New Century shareholders, any other plaintiff (including Larson and Hooten),<sup>15</sup> or putative class members in this litigation are protected from disclosure under the attorney-client privilege. *See* Lopez Decl., Exh. F, at 138; Exh. H, at 156-157; Exh. J, at 167-168. Like its work product assertion above, Plaintiffs again get the law wrong.

*First*, to assert the privilege, an attorney-client relationship between Plaintiff's counsel and New Century shareholders and putative class members must exist. *See Fisher v. United States*, 425 U.S. 391, 403 (1976). It is well-settled in California, however, that there is no attorney-client relationship between Lead Plaintiffs' counsel and a putative class member before class certification. *See Castaneda v. Burger King Corp.*, 2009 U.S. Dist. LEXIS 69592, at \*13 (N.D. Cal. Jul. 31, 2009) ("The case law is unambiguous that potential class members are unrepresented prior to class certification...."); *see also Babbitt v. Albertson's Inc.*, 1993 U.S. Dist. LEXIS 18801, at \*4 (N.D. Cal. 1993); *Atari v. Superior Court*, 166 Cal. App. 3d 867 (1985).

*Second*, even if there was an attorney-client relationship, pre-existing documents exchanged between a client and his or her attorney are not protected under the privilege. *See Fisher*, 425 U.S. at 403 ("This Court and the lower courts have thus uniformly held that pre-existing documents which could have been obtained by court process from the client when he was in possession may also be obtained from the

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<sup>15</sup> As reflected in the Court's docket, counsel for Lead Plaintiffs, Bernstein Litowitz Berger & Grossman LLP, do not represent Larson and Hooten.

attorney by similar process following transfer by client in order to obtain more informed legal advice.”); *see also Upjohn Co. v. United States*, 449 U.S. 383, 395-96 (1981) (“The [attorney-client] privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney.”); *United States v. Robinson*, 121 F.3d 971, 975 (5th Cir. 1997) (notice of forfeiture given to attorney by client discoverable because it was a pre-existing document that “could have been obtained by court process from the client when he was in possession. . . .”); *Ist Technology, LLC v. Rational Enterprises Ltd.*, 2008 U.S. Dist. LEXIS 106101, at \*15-16 (D. Nev. Jul. 15, 2008) (pre-existing documents that the client could be ordered to produce if they were still in his possession were not protected from disclosure by attorney-client privilege); *see also Green & Shinee v. Superior Court*, 88 Cal. App. 4th 532, 536-37 (2001) (“Documents prepared independently by a party, including witness statements, do not become privileged communications or work product merely because they are turned over to counsel.”).

There is no question that KPMG would be entitled to obtain the requested documents from the putative class members, New Century shareholders, and other plaintiffs through lawful process. *See Castaneda*, 2009 U.S. Dist. LEXIS 69592, at \*21 (“Both parties are permitted to take pre-certification discovery, including discovery from prospective class members.”). Therefore, there can also be no question that the attorney-client privilege does not apply to documents Plaintiffs received from New Century shareholders, other plaintiffs, or putative class members. KPMG is entitled to discovery of those documents, and this Court should compel Plaintiffs to produce them.

#### **B. PLAINTIFFS’ POSITION**

KPMG Request Nos. 36 & 38 seek production of all documents from January 1, 2005 to the present received from any current and/or former New Century shareholder concerning New Century (Request No. 36) and all documents from January 1, 2005 to

1 the present created by or received from any other plaintiff or putative class member  
 2 (Request No. 38). Together with KPMG Request Nos. 50-57, KPMG apparently  
 3 seeks production of Plaintiffs' Lead Counsel's entire investigation file.

4 As an initial matter, Plaintiffs have agreed to produce documents responsive to  
 5 KPMG's Request No. 38 in Plaintiffs' files (*i.e.*, documents created by or received  
 6 from any other plaintiff and/or putative class member). Nonetheless, KPMG seeks to  
 7 compel production of (i) documents that NYSTRS's *counsel* received from New  
 8 Century shareholders and (ii) communications between NYSTRS's *counsel* and New  
 9 Century shareholders in connection with this action. As explained below, such  
 10 documents and communications are privileged attorney-client communications.

11 Relying on *Castaneda v. Burger King Corp.*, 2009 U.S. Dist. LEXIS 69592  
 12 (N.D. Cal. July 31, 2009), KPMG asserts that it is "well-settled in California" that no  
 13 attorney-client relationship exists between lead counsel and a putative class member  
 14 before class certification. KPMG's argument is off-point. Unlike *Castaneda*, this  
 15 discovery dispute does not concern whether KPMG or its counsel may have *ex parte*  
 16 contact with class members.<sup>16</sup>

17 Instead, this discovery dispute concerns KPMG's efforts to obtain discovery of  
 18 communications between Plaintiffs' Lead Counsel and putative class members. Here,  
 19 the majority of authorities – including *Castenda, in dicta* – confirm that such  
 20 discovery is improper because it invades protected communication. *See, e.g., Barton*  
 21 *v. U.S.D.C. Dist. Cal.*, 410 F.3d 1104, 1111 (9th Cir. 2005) (the attorney-client  
 22 privilege applies to communications with a prospective client, even before the lawyer  
 23

---

24 <sup>16</sup> KPMG's other cited authorities, *Babbitt v. Albertson's Inc.*, 1993 U.S. Dist. LEXIS  
 25 188091 (N.D. Cal. Jan. 28, 1993) and *Atari v. Sup. Ct.*, 166 Cal.App.3d 867 (1985),  
 26 both address the same question as *Castaneda*; *i.e.*, whether defense counsel may have  
 27 *ex parte* communications with absent class members under California law. This issue  
 28 is not in dispute in this motion.

1 represents the client and with no assurances that it will); *Castaneda*, 2009 U.S. Dist.  
 2 LEXIS 69592, at \*19 (“The fact that the putative class members in this case contacted  
 3 Plaintiffs’ counsel may create a privilege for their communications with class  
 4 counsel.”). Indeed, in *Castaneda*, defense counsel were “admonished not to inquire  
 5 into the substance of any communications” between putative class members and class  
 6 counsel. *Id.*

7 KPMG’s argument that all communications must be produced because putative  
 8 class members are not “clients” of Lead Counsel is untenable. As in most cases  
 9 prosecuted by Lead Counsel, absent class members often contact attorneys with  
 10 various inquiries, including questions about whether they are members of the class,  
 11 the status of litigation and information about the class claims. Similarly, named  
 12 plaintiffs Larson and Hooten have met with and discussed this case with Lead  
 13 Counsel, whom they recognize as *their* counsel in this case.

14 “In general, confidential communications between individuals and attorneys for  
 15 the purpose of obtaining or rendering legal advice are privileged,” and “the attorney-  
 16 client privilege attaches to the preliminary discussions about representation between a  
 17 lawyer and a prospective client, even if the client decides not to employ the lawyer.  
 18 Without this protection, individuals’ ability to seek legal advice would be constrained,  
 19 as they would not feel safe approaching an attorney about a possible case.” *Sandoval*  
 20 *v. Am. Bldg. Maintenance Indus., Inc.*, 2007 U.S. Dist. LEXIS 97773, at \*44-45 (D.  
 21 Minn. Oct. 23, 1977); *see also Barton*, 410 F.3d at 1104 (same).

22 In *Tierno v. Rite Aid Corp.*, 2008 WL 2705089, at \*3-4 (N.D. Cal. July 8,  
 23 2008), the court rejected defendants’ argument that communications between Lead  
 24 Counsel and class members were not privileged where a class had not yet been  
 25 certified. *See also Castaneda v. Burger King Corp.*, 2009 WL 2382688, at \*6 (N.D.  
 26 Cal. July 31, 2009) (“The fact that the putative class members in this case contacted  
 27 Plaintiffs’ counsel may create a privilege for their communications with class  
 28

1 counsel . . . . Defense counsel are admonished not to inquire into the substance of any  
 2 communications between Plaintiffs' counsel and putative plaintiffs"). Indeed, Lead  
 3 Counsel have a fiduciary duty to class members both before and after class  
 4 certification, and communications with putative class members must be afforded  
 5 protection.

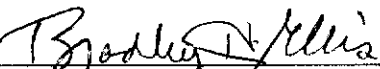
6 Finally, to the extent any such communications or documents might not be  
 7 protected from disclosure, KPMG has no legitimate reason for the discovery other  
 8 than to harass and intimidate Plaintiffs and Lead Counsel. Putative class members do  
 9 not represent the class and are not active participants in the litigation. As such, the  
 10 communications between Lead Counsel and putative class members are not relevant.  
 11 *See, e.g., Epstein v. Am. Reserve Corp.*, 1985 U.S. Dist. LEXIS 15842, at \*7-8 (N.D.  
 12 Ill. Sept. 18, 1985) (finding that communications plaintiffs or their attorneys had with  
 13 any potential class member are irrelevant and not subject to discovery). Indeed,  
 14 discovery relating to absent class members is inappropriate because they are not  
 15 parties for discovery purposes, and courts have required a party seeking discovery  
 16 from unnamed class members to obtain a court order before propounding such  
 17 discovery. *See, e.g., Guenther v. Sedco, Inc.*, 1998 WL 898349, at \*6-7 (S.D.N.Y.  
 18 Dec. 22, 1998) (observing that absent class members are not parties for discovery  
 19 purposes); *Kline v. First Western Gov't Sec.*, 1996 WL 122717, at \*2 (E.D. Pa.  
 20 Mar. 11, 1996) (determining, after "surveying" cases, that "it is safe to state that  
 21 discovery of absent class members is disfavored."); *Kops v. Lockheed Martin Corp.*,  
 22 2003 U.S. Dist. LEXIS 8568, at \*4 (C.D. Cal. May 12, 2003) (party seeking discovery  
 23 from unnamed class members must obtain court order before propounding discovery).  
 24 Further, allowing such discovery would require Lead Counsel to undertake a broad  
 25 electronic search for any and all communications it might have had with any absent  
 26 class member who inquired concerning the status of the case that could have been  
 27 made at any time from the pendency of this action to the present. Such a search would

1 discovery. *See, e.g., Guenther v. Sedco, Inc.*, 1998 WL 898349, at \*6-7 (S.D.N.Y.  
2 Dec. 22, 1998) (observing that absent class members are not parties for discovery  
3 purposes); *Kline v. First Western Gov't Sec.*, 1996 WL 122717, at \*2 (E.D. Pa.  
4 Mar. 11, 1996) (determining, after "surveying" cases, that "it is safe to state that  
5 discovery of absent class members is disfavored."); *Kops v. Lockheed Martin Corp.*,  
6 2003 U.S. Dist. LEXIS 8568, at \*4 (C.D. Cal. May 12, 2003) (party seeking discovery  
7 from unnamed class members must obtain court order before propounding discovery).  
8 Further, allowing such discovery would require Lead Counsel to undertake a broad  
9 electronic search for any and all communications it might have had with any absent  
10 class member who inquired concerning the status of the case that could have been  
11 made at any time from the pendency of this action to the present. Such a search would  
12 be enormously burdensome and not result in any relevant discovery. Accordingly,  
13 KPMG's requests should be denied.

14  
15 Dated: September 23, 2009

Respectfully submitted,

16 KPMG LLP

17  
18 By:   
19 Bradley H. Ellis  
20 Attorneys For Defendant KPMG LLP  
21  
22  
23  
24  
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26  
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1  
2 Dated: September 22, 2009

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16 *Class*